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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Defendants-Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff-Respondent, vs.

PSL REALTY CO., a corporation, et al,

Defendants-Respondents,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT

QUESTIONS PRESENTED FOR REVIEW

1. Subsequent to the granting of a Petition for a Writ of Temporary Injunction, the Circuit Court of Madison County, Illinois, appointed the Federal Savings and Loan Insurance Corporation receiver of certain properties which were the subject of dispute between the parties to the injunction. Extended proceedings in the state and federal courts ensued, culminating in the United States District Court for the Southern District of Illinois' exercise of its injunctive powers to enjoin the Illinois state courts from interference with its jurisdiction over certain property subject to a mortgage foreclosure action instituted in the district court nearly four years earlier but some 4 1/2 years subsequent to the state court order appointing FSLIC receiver. On interlocutory appeal from the district court order granting

the injunction, the Court of Appeals for the Seventh Circuit affirmed the district court's order, holding that the state courts had never acquired jurisdiction over the properties in the first instance, and thus, the district court, having obtained exclusive possession and control of the properties by virtue of the mortgage foreclosure proceeding, properly exercised its discretion in invoking its injunctive powers to protect its jurisdiction. The questions presented therefore are:

1. Whether the Court of Appeals' holding that the Illinois state courts never acquired jurisdiction over certain properties pursuant to the state court's appointment of the Federal Savings and Loan Insurance Corporation as receiver of those properties is contrary to the provisions of Section 9, Article VI, Constitution of Illinois 1970, the statutes of the State of Illinois, and the decisional law of this Court and the Supreme Court of the State of Illinois.

2. Whether this Court should exercise its supervisory authority and reverse the District Court's injunction, sanctioned by the Court of Appeals, which

constitutes an improper intrusion upon the powers of the Courts of the State of Illinois to police the integrity of its officers.

TABLE OF CONTENTS

Questions Presented for Review

Table of Contents

Table of Authorities

Opinions Below

Jurisdiction

Constitutional Provisions Involved

Statutes Involved

Statement of The Case

Argument

Appendix A (Opinion of Court of Appeals)

Appendix B (Order of Court of Appeals Denying Rehearing)

Appendix C (Opinion of District Court)

Appendix D (Opinion of Illinois Appellate Court - 1976)

Appendix E (Opinion of Illinois Appellate Court - 1979)

TABLE OF AUTHORITIES

American Surety v. Baldwin, 287 U.S. 156

Anderson v. Macek, 350 Ill. 135

City of Chicago v. Hart Building Corp., 116 Ill.App.2d 39

Cicero v. Olgiati, 410 F.Supp. 1080 (S.D.N.Y. 1976)

Cousing v. Wigoda, 463 F.2d 603 (7th Cir. 1972)

Donovan v. Dallas, 377 U.S. 408

Duke v. State of Texas, 477 F.2d 244 (5th Cir. 1973)

Firebaugh v. McGovern, 404 Ill. 143

Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316 (8th Cir. 1975)

Jackson v. Smith, 254 U.S. 586

Juidice v. Vail, 430 U.S. 327

Knaus v. Chicago Title and Trust Co., 365 Ill. 588

Kneisel v. Ursus Motor Co. 316 Ill. 336

Miller v. Rowan, 251 Ill. 344

Palmer v. Texas, 212 U.S. 118

People v. Berof, 367 Ill. 454

The People v. Leavens, 288 Ill. 447

People v. Leonard, 279 Ill. 159

People v. Western Tire and Auto Stores, Inc., 32 Ill.2d 527

People v. White, 334 Ill. 465

People v. Zimmer, 238 Ill. 607

Phelan v. Middlestates Oil Corp., 154 F.2d 978 (2d Cir. 1946)

Sherman v. The People, 210 Ill. 552

Princess Lida v. Thomspon, 305 U.S. 456

U.S. v. Maragas, 390 F.2d 88 (6th Cir. 1968)

Wilson Bros. v. Haege, 347 Ill. 140

U.S. Sup. Ct. Rule 19 1(b), 28 U.S.C. Rule 19

Ill. Const. 1970, Art. VI, §9

28 U.S.C. §1738

Ill.Rev.Stat. 1971, Ch. 69, pars. 1, 3

14 I.L.P. Courts §16

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 603 F.2d 515 (1980), Appendix A, infra. The opinion of the United States District Court for the Southern District of Illinois is reported at 482 F.Supp. 77 (1979), Appendix C, infra. The opinions of the Appellate Court of Illinois, Fifth Judicial District, are reported at 42 Ill.App.3d 697, 1 Ill.Dec. 417, 356 N.E.2d 605 (1976), Appendix

D, infra, and 76 Ill.App.3d 978, 32 Ill.Dec. 411, 395 N.E.2d 641 (1979), Appendix E, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 12, 1980. Appendix A, infra. A timely-filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied by order filed on December 23, 1980. Appendix B, infra. This Petition for Certiorari was filed less than 90 days from the date of the order denying the Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article IV, §1:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Constitution of Illinois 1970, Article VI, §9:

Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provided by law.

STATUTES INVOLVED

28 U.S.C., Sec. 1738:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Ill.Rev.Stat. 1971, Ch. 69, pars. 1, 3:

§1. The circuit courts shall have power to grant writs of injunction.

***

§3. No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

STATEMENT OF THE CASE

On April 11, 1972, Illini Federal Savings and Loan Association and PSL Realty Co., Inc., its wholly owned subsidiary, obtained a preliminary injunction against James C. Green and Granite Investment Company. Granite Investment Company is a limited partnership of which James C. Green is the principal. Illini Federal Savings and Loan Association is the successor to Piasa Federal Savings and Loan Association pursuant to a supervisory merger procured by the Federal Savings and Loan Insurance Corporation in 1970. PSL Realty is a corporation originally formed by Piasa to

hold legal title to certain properties formerly owned by Green and subject to mortgage loans to Piasa. The events leading up to Illini/PSL's petition for injunctive relief are set forth in the Court of Appeals' opinion (Appendix A, infra). Although some of the facts in the Court of Appeals' opinion are disputed, it is undisputed that the Federal Savings and Loan Association's involvement in the litigation which ultimately led to the petition now before this Court arose as a result of FSLIC's relationship with Illini under a Contribution Agreement entered into between FSLIC and Illini pursuant to the Piasa-Illini merger in 1970 and the subsequent appointment of FSLIC as state court receiver for certain properties which had become the subject of dispute between Illini-PSL and Granite Investment and Green.

Granite and Green appealed from the order of the Circuit Court of Madison County, Illinois, granting the preliminary injunction.

On July 23, 1976, the Appellate Court of Illinois, Fifth District, filed an opinion stating "Temporary injunction and receivership dissolved." (Appendix D, infra). On August 13, 1976, PSL and Illini filed a petition for rehearing in the Appellate Court. On August 18, 1976, FSLIC purchased first lien mortgages on all properties of which it was receiver pursuant to the state circuit court's order, and on August 26, 1976, without notice to Granite or Green, the trial court or the Appellate Court, FSLIC filed a mortgage foreclosure action in the United States District Court for the Southern District of Illinois on all mortgages of which it was receiver under the circuit court order. (Appendix E, infra). The Appellate Court's mandate reinvesting jurisdiction in the circuit court did not issue until October 13, 1976. (Appendix E, infra,).

Upon appeal after remand to the Circuit Court of Madison County, Illinois, the

Appellate Court, when made aware of the fact that FSLIC had proceeded with mortgage foreclosure proceedings at a time when it had not been discharged as the state court's receiver for the properties and of its actions in pursuit of the foreclosure action, ordered FSLIC to "... stay any further action of any nature whatsoever in regard to the 48 mortgages, including, but not limited to, the prosecution of any action to foreclosure (sic) upon the 48 mortgages in Federal District Court for the Southern District of Illinois, or any other court ...". The Appellate Court also ordered certain other prohibitions against FSLIC. (Appendix E, infra,).

The proceedings in the United States District Court are set forth in its opinion (Appendix C). For purposes of this petition, it is sufficient to note that the District Court considered that an injunction of the state court proceeding was required to effectuate the District Court's jurisdiction

(Appendix C, infra,). The District Court's order for injunction was made permanent on October 11, 1979.

Granite, Green, Howard Steele Construction Co., Inc., and the justices of the Illinois state courts appealed to the United States Court of Appeals for the Seventh Circuit pursuant to 128 U.S.C., §1291(a)(1), raising issues concerning the District Court's failure to give full faith and credit to the state courts' decisions, the District Court's intrusion upon the power of the state courts to police the integrity of its own officers, the matter of jurisdiction over the District Court's jurisdiction over the property and the parties, and whether FSLIC could unilaterally confer jurisdiction on the federal court after having put its rights in issue in the state court. The Court of Appeals for the Seventh Circuit affirmed the District Court on the ground that the state courts never acquired jurisdiction in the first instance and,

therefore, the Madison County, Illinois Circuit Court's order appointing FSLIC receiver was void ab initio. Petitions for rehearing were denied and this petition follows.

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

12 U.S.C. §1730(k)(1)

ARGUMENT

By its holding that the Illinois state courts never acquired jurisdiction of the properties in this case the Court of Appeals has avoided reaching serious questions concerning the District Court's failure to give full faith and credit to the decisions of the Illinois state courts and has likewise avoided equally serious questions concerning the District Court's intrusion upon the powers of the state courts to police the integrity of its officers. This Court should reverse the Court of Appeals' holding on the

jurisdictional question and reverse the District Court's order under this Court's supervisory powers.

ARGUMENT

I

The Court of Appeals' holding that the Illinois courts never acquired jurisdiction is contrary to constitutional, statutory and decisional law.

The Court of Appeals' opinion recognizes that because the Federal Savings and Loan Insurance Corporation has not yet been discharged as receiver, under the general law of receivership, the receivership property involved in this case would remain with the state court to this day but for the Court of Appeals' conclusion that the Circuit Court of Madison County, Illinois failed to acquire possession of the properties in the first instance. (Appendix A). Relying upon Firebaugh v. McGovern, 404 Ill. 143, 88 N.E.2d 473 (1949), however, the Court of Appeals

concluded that the Circuit Court of Madison County, Illinois, lacked jurisdiction to adjudicate the "principal matter", and therefore the Circuit Court's order purporting to grant the ancillary relief of temporary receivership was beyond its jurisdiction and as such was void ab initio (Appendix A, infra).

Petitioner respectfully submits that this conclusion is in error.

The issue upon which the Court of Appeals' opinion turned, i.e. whether or not the 1972 order of the Madison County Circuit Court creating the receivership was in excess of the jurisdiction of that court and, therefore, void ab initio, was never suggested, briefed or argued by any party to that action nor was such a ruling issued by the District Court. The FSLIC has always maintained that the state court had jurisdiction. And heretofore it has argued only that the state court lost jurisdiction in

1976 at which time, it argued below, the Federal Court was free to assume jurisdiction.

The opinion of the Court of Appeals that the 1972 receivership was void ab initio is directly contrary to a year earlier judgment made by the Appellate Court for the Fifth District of the State of Illinois which under the full faith and credit provisions of the constitution is binding upon the Federal Courts.

The Appellate Court found, on September 13, 1979:

> "While receiver of the extensive properties involved in this case the receiver purchased mortgages on the properties and filed suit to foreclose them. This at a time when the receiver was the legal custodian of the property for the court. A receiver is an officer of the court, and his possession is the possession of the court." (Emphasis added.) (76 Ill.App.3d 978, 995; 395 N.E.2d 641, 654)

In the Order issued by Justice Jones on September 26, 1979, the Appellate Court reiterated:

"This court does, however, have jurisdiction over the parties and over the subject matter of this cause of action as described in the September 13, 1979 opinion." (Emphasis added.) (76 Ill.App.3d 978, 1002; 395 N.E.2d 641, 659)

In its supplemental opinion filed on October 2, 1979, the Appellate Court stated:

"At the time of the purchase and commencement of the foreclosure action, this court had full jurisdiction of the entirety of the action, part, parcel, parties and receiver." (Emphasis added.) (76 Ill.App.3d 978, 1000; 395 N.E.2d 641, 658)

The Court of Appeals, at page 521 of its Opinion, incorrectly interpreted the Appellate Court's rulings:

"Since the Circuit Court of Madison County was found to be without jurisdiction to award the ancillary remedy of receivership, its order placing the properties in receivership and appointing FSLIC as receiver was void. Since the state court was not a court of competent jurisdiction exercising control over the properties which would preclude the institution of an action concerning the properties in Federal Court, the District Court was free to assert its exclusive jurisdiction over the properties in the foreclosure suit, and appropriately did so by its order effective October 13, 1976."

In point of fact, no court ever had found that the Circuit Court of Madison County "was without jurisdiction", prior to the opinion filed by the Court of Appeals. No such language appears in the Appellate Court opinions. To be sure, the order establishing the receivership was found to be "ancillary", but the Illinois Appellate Court did not find this to be a void ab initio order issued by a court with no jurisdiction. Nowhere does it appear that the Illinois Appellate Court "found the Circuit Court of Madison County to be without jurisdiction" or that the order appointing the FSLIC as receiver was void. Instead, it found possession to be in the state court and that it had and continues to have jurisdiction.

28 U.S.C., Sec. 1738, states:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage

in the courts of such State, Territory or Possession from which they are taken."

Without question, a long line of cases requires the Federal Courts to give full credit to the Appellate Court's prior findings of September 13, 1979 (reaffirmed on September 26 and on October 2, 1979) that the state court had possession of the property; that the receiver was its "legal custodian"; and that the state court had "jurisdiction of the entirety of the action, part, parcel, parties and receiver".

In American Surety v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 237, the Court said:

> "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts. Act of May 26, 1970, chap. 11, 1 Stat. at L. 122; Act of March 27, 1804, chap. 56, §2, 2 Stat. at L. 299; Rev. Stat §905, U.S.C. title 28, §687; Mills v. Duryee, 7 Cranch, 481, 485, 3 L. ed. 411, 413; Mutual L. Ins. Co. v. Harris, 97 U. S. 311, 336, 24 L. ed. 959, 962. Compare

Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 155, 76 L. ed. 1026, 1032, 52 S. Ct. 571. The principles of res judicata apply to questions of jurisdiction as well as to other issues. Baldwin v. Iowa State Traveling Men's Aso., 283 U.S. 522, 75 L. ed. 1244, 51 S. Ct. 517. They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. See Marshall v. Holmes, 141 U.S. 589, 596, 35 L. ed. 870, 872, 12 S. Ct. 62; Fidelity & D. Co. v. Gastnn, Williams & Wigmore (D.C.) 13 F. (2d) 268. The principles of res judicata may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, res judicata, and precludes a suit to enjoin enforcement of the judgment. Bernhard v. Idaho Bank & T. Co., 21 Idaho, 598, 123 Pac. 481 Ann. Cas. 1913E, 120. Since the decision would formally constitute res judicata in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the

> decision is a bar to the present suit insofar as it seeks to enjoin the enforcement of the judgment for want of jurisdiction."

This case, we believe, controls. The rule enunciated there has always been the law. The Court of Appeals' opinion which ignores directly contrary state court rulings on issues between identical parties is in opposition to a line of cases long in existence and consistently followed.

In Palmer v. Texas, 212 U.S. 118, 53 L.Ed. 435, 29 S.Ct. 230, the court said at 53 L.Ed. 441:

> "The Texas courts have the right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal Courts."

See also Donovan v. Dallas, 377 U.S. 408, 12 L.Ed.2d 409, 84 S.Ct. 1579; Porter Sabin, 149 U.S. 473, 37 L.Ed. 815; Princess Lida v. Thompson, 305 U.S. 456, 83 L.Ed. 285.

Under the Constitution of Illinois 1970 "Circuit Courts shall have original

jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office." Ill. Const. 1970, Art. VI, §9. Illinois, therefore, has no courts of limited subject matter jurisdiction; if a matter is justiciable at law, it is triable in the Circuit Court. By statute, the Madison County Circuit Court had power to grant a writ of injunction or a preliminary injunction at the time this case was filed. Ill.Rev.Stat. 1971, Ch. 69, pars. 1, 3. And, a court which has jurisdiction of the subject matter of the general class to which a case belongs and which has jurisdiction of the parties has "jurisdiction". Wilson Bros. v. Haege, 347 Ill. 130, 143, 179 N.E. 459 (1932).

In the Wilson case just cited,

plaintiff filed in the Circuit Court of Rock Island County a purported affidavit in replevin. After judgment was rendered in appellee's favor, defendant appealed, contending inter alia that the purported affidavit was insufficient and that because the statute required the filing of a sufficient affidavit, the circuit court lacked jurisdiction. The Supreme Court stated:

> "In the state of this record we are not called upon to pass upon the sufficiency of the purported affidavit. It is a historical fact that the first Illinois state replevin statute recognized replevin as an action at law existing in Illinois prior to the enactment of such just statute on the subject. The Circuit Court of Rock Island County had jurisdiction of the subject matter of suits in replevin, to which this case belongs. *** The court having jurisdiction of the persons of the parties to the cause and jurisdiction of this particular case --i.e., the right and power to hear and determine the particular case." Wilson Bros. v. Haege, supra, 347 Ill. 142-143.

"Jurisdiction of the subject matter does not depend on the sufficiency of the

pleadings, or on the validity of the demand, the regularity of the proceedings, or the correctness of the decision, ..." 14 I.L.P. Courts §16. The cases supporting this view are ancient and legion. In The People v. Leavens, 288 Ill. 447, 123 N.E. 545 (1919), defendants appealed from a judgment obtained against defendants' lands for a delinquent drainage assessment. It was shown to the court that defendants had appeared and filed objections in a prior action for changes and new construction which the drainage district had brought under the wrong section of the Levee Act of 1879, but that defendants had not appealed from the circuit court's decision adverse to them in that action. Rather, defendants in the action against them for the delinquent assessments urged that the judgment on the prior petition was void.

because the county court was without jurisdiction of the subject matter. The Supreme Court affirmed, citing and quoting from People v. Leonard, 279 Ill. 159, 116 N.E. 612 (1917), a case in which "... while the petition was filed under the wrong section of the statute and the levy of the assessment was void, 'it does not follow that the court was without jurisdiction to make any order. The petition purported to be filed under Section 37. The court had jurisdiction of the general subject of assessments upon lands of the district for additional work or the completion of any work already commenced within any drainage district to insure the protection of drainage of the lands in the district. The petition for such an assessment gave it jurisdiction over the particular case. The petition asked for an order which it was erroneous for the court to make but

the general subject was within the jurisdiction of the court. Its order, therefore, however erroneous, was not subject to collateral attack. ***'" Leavens, supra, 288 Ill. 449.

The Illinois Supreme Court continued in Leavens to note the distinction between the jurisdiction of the subject matter and an erroneous exercise of jurisdiction. Quoting from an even older case (Miller v. Rowan, 251 Ill. 344, 96 N.E. 285 (1911)), the court said: "...'(I)f a bill states a case belonging to a class over which the authority of the court extends, the jurisdiction attaches and no error committed by the court can render the judgment void. If the court has jurisdiction, it is altogether immaterial, when the judgment is collaterally called into question, how grossly irregular or manifestly erroneous its proceedings may have been. The judgment cannot be regarded as

a nullity, and cannot, therefore, be collaterally impeached' ***." Leavens, supra, 288 Ill. 450-451. See also: Knaus v. Chicago Title and Trust Co., 365 Ill. 588, 592, 71 N.E.2d 298 (1937) ("/Subject matter/ jurisdiction is conferred by the constitution or by legislative enactment and does not depend upon the sufficiency of the bill of complaint in a particular case, the validity of the demand set forth therein, the regularity of the proceedings, or the correctness of the decision rendered. /citations omitted/." To the same effect is People v. Western Tire Auto Stores, Inc., 32 Ill.2d 527, 207 N.E.2d 474 (1965).

The court in Rowan v. Miller, supra, discusses at some length the confusion surrounding the use of the word

jurisdiction as applied to courts of equity and draws the distinction between the use of the word to denote lack of power to decide a matter as opposed to an improper exercise of chancery powers. (251 Ill. 348-350) Defendants respectfully submit that the Court of Appeals misunderstood Illinois law concerning the Circuit Court's jurisdiction in this case for the very reasons discussed in Rowan.

Thus, it cannot legitimately be argued that the Circuit Court of Madison County lacked subject matter jurisdiction in this case. The court had the general power or authority to hear and determine a petition for a preliminary injunction by Constitution and by statute. It therefore had subject matter jurisdiction as to this general class of case, and even if its exercise of that jurisdiction was erroneous, as the Appellate

Court obviously held, its order granting the temporary injunction and appointing a receiver was not void.

The Illinois Appellate Court has never once questioned the circuit court's jurisdiction to entertain a prayer for a temporary injunction in this case. The Appellate Court's only holding was that the temporary injunction was improvidently granted, not for a lack of power vested in that court to grant such relief, for the court clearly had such power by Constitution and statute, but rather because the plaintiffs in the state court action failed, in the Appellate Court's considered opinion, to allege facts entitling them to that relief. The circuit court had jurisdiction to grant a preliminary injunction and it therefore had jurisdiction to appoint FSLIC as receiver. That its exercise of its jurisdiction was erroneous, according to the Appellate

Court, does not render its action void ab initio.

In both the state courts below, the FSLIC has assiduously avoided any conclusion that would treat its possession in the 4 1/2 y3ars prior to the Illinois Appellate Court's 1976 decision as pursuant to an absolutely void order. It has consistently agreed that the Madison County Circuit Court had jurisdiction at the outset.

The FSLIC, in discussing Granite's argument that the courts of the State of Illinois had exclusive possession, said, at page 27 of its Brief filed in the Seventh Circuit:

> "Their argument begins with the assertion that the courts of the State of Illinois acquired exclusive possession of the property by the appointment of a receiver on April 28, 1972 (Granite's Brief at page 53) with this assertion, FSLIC has no quarrel."

At page 28, the FSLIC also said:

> "A trial court of the State of Illinois indeed took exclusive possession of the property in 1972."

The FSLIC has had two state court appeals in which to contest the issue of jurisdiction -- the original appeal taken by Granite in 1972 and the second appeal taken by Granite in 1976 -- in neither appeal did any party suggest the Madison County Circuit Court to be without jurisdiction so as to make all of its orders void ab initio.

Nor has the Honorable Federal District Judge found that the state court never had jurisdiction. Rather, the District Judge has always acknowledged original jurisdiction in the state court, and has held only that, while the state court did have jurisdiction, it lost that jurisdiction when the receivership was dissolved in 1976. The District Court's

injunctive order of October 2, 1979, recites that it "concluded that the Illinois courts relinquished possession of the receivership properties in 1976 upon dissolution of the state court receivership notwithstanding the subsequent state court proceedings involving the receiver's final accounting." The finding that the state court "relinquished possession" in '76 is clearly an expression of the District Court's conclusion that the state court had jurisdiction, for without possession there can be no jurisdiction.

FSLIC argued in the court below that the Appellate Court's statement in its 1979 opinion concerning the federal court's jurisdiction of the parties and subject matter constituted a concession of jurisdiction in the federal district court. The Appellate Court undoubtedly recognized that the District Court had

the power to hear and determine mortgage foreclosure actions and undoubtedly was aware of the fact that none of the parties had contested the court's in personam jurisdiction. Therefore, although the Appellate Court recognized that the District Court had the power to determine a case of the class before it and had in personam jurisdiction, the Appellate Court also well recognized that it had no power to determine whether or not the District Court was indulging in a proper exercise of that power and would not pretend to do so.

The Court of Appeals' reliance on Firebaugh v. McGovern, 404 Ill. 143, 88 N.E.2d 473 (1949) is misplaced. In the first place, the Illinois Supreme Court in Firebaugh sustained the validity of an order involving general jurisdiction to appoint a receiver of a corporation. There, separate groups of persons claiming an

interest in a corporation filed complaints for injunctive relief against each other. The court on its own motion appointed a receiver for the corporate assets until the case was determined. On appeal by one of the competing groups, the order appointing the receiver was reversed by the Appellate Court on the ground that the trial court was without jurisdiction to enter such an order. While the Appellate Court decision was pending, the parties settled their differences and the receiver was directed to return the building and certain funds to the parties who were plaintiffs in the original case and in the case before the Supreme Court. The receiver's final account was filed one week before the Appellate Court decision. After the Appellate Court decision was received, the corporation filed objections to the receiver's account, "... basing its contentions on the holding of the Appellate

Court that the order appointing the receiver was void for lack of jurisdiction." The trial court approved certain of the receiver's expenditures but sustained the objection to any compensation for services as receiver and for attorney's fees. The corporation appealed and the Appellate Court reversed and remanded with directions to sustain all objections to the receiver's report. The receiver was granted leave to appeal.

The Supreme Court reversed the Appellate Court in Firebaugh, holding that the Appellate Court's decision that the superior court was without jurisdiction to appoint a receiver was erroneous. Any thought that Firebaugh supports the proposition advanced by the Court of Appeals that the appointment of the receiver in the instant case was void must arise from the Firebaugh court's discussion of the distinction ". . .

between cases wherein the ultimate relief sought is within the general or statutory jurisdiction of the court and those wherein such ultimate relief is beyond its jurisdiction." (Firebaugh, supra. 404 Ill.143). Discussing the class of cases wherein the trial court has no jurisdiction to adjudicate the principal matter, the court cited Steenrod v. Gross Co., 334 Ill. 362, 166 N.E. 82 (1929). Steenrod was a case in which no matter how the complaint which resulted in appointment of a receiver had been pleaded, the court would have been without power to appoint the receiver and grant the ultimate relief sought. The genesis of Steenrod has been a bill which sought in substance the dissolution of a solvent corporation, distribution of its assets and the appointment of a receiver in aid of that goal. This the Steenrod court held was without the general equity powers of the court, the statute granting

no power to the court to grant such relief. (334 Ill. 368) As has been stated, the Firebaugh court noted the distinction (404 Ill. 150-151).

In the state court case which preceded the instant action, plaintiffs' complaint sought certain affirmative relief which could well have been characterized as a prayer for specific performance of the terms of certain contracts (turnover of rents, examination and production of rent rolls, books, leases and records) along with injunctive relief. Defendants filed a "Cross-Complaint for Injunction" and a "Motion to Quash Injunction" which clearly indicated that defendants perveived the ultimate issues to involve contract questions. The trial court's order denied Granite's Motion to Dissolve Injunction, denied Granite's Cross-Complaint, appointed FSLIC as receiver, and effectively left the theretofore-

entered temporary injunction in effect" ... until the final adjudication of the rights of the parties hereto is determined by this court."

The Circuit Court of Madison County, Illinois had Constitutional and statutory jurisdiction in the state court action. The Appellate Court of Illinois, Fifth District, has never said otherwise. Neither should the Seventh Circuit Court of Appeals have so held.

II

This Court should exercise its supervisory powers and reverse the District Court's injunction, sanctioned by the Court of Appeals, which constitutes an improper intrusion upon the powers of the courts of the State of Illinois to police the integrity of its officers.

Petitioners have argued that the Court of Appeals' decision is in conflict with the constitutional, statutory and decisional law of the State of Illinois. (Argument No. 1, supra). In wrongfully deciding the question of jurisdiction, the Court of Appeals has sanctioned an injunction which is an improper intrusion upon the powers of the courts of Illinois to police the integrity of its officers. This Court should exercise its power of supervision to reverse the improper injunction entered by the District

Court and sanctioned by the Court of Appeals. (U. S. Sup. Ct. Rule 19 1(b), 28 U.S.C. Rule 19).

The action of the FSLIC, a state-appointed receiver, while it was acting in its capacity as receiver in purchasing the 48 mortgages on the receivership property on August 18, 1976, constituted a direct criminal contempt of the Circuit Court of Madison County, Illinois. That the receiver, at that time, was acting solely in its capacity as a state-appointed receiver of a state-initiated receivership pursuant to powers given it by the state court is without question. That the action of a receiver in so dealing with receivership property is a direct criminal contempt is also without question. The action of any party, be it creditor or receiver, against or upon receivership property without permission of the court

is a direct criminal contempt which can be, if committed in the presence of the court, or, if admitted to the court, punished summarily. The receiver has admitted by its Brief filed in the Illinois Appellate Court and by its counsel in person that it did purchase these 48 mortgages on August 18, 1976 without notice or permission. Thus, the courts of the State of Illinois have the inherent power to punish these contemptuous actions, without hearing, if desired. City of Chicago v. Hart Building Corporation, 116 Ill.App.2d 39 (Cert. denied, 398 U.S. 950); 8 A.L.R. 1548, 1550; Kneisel v. Ursus Motor Company, 316 Ill. 336; Anderson v. Macek, 350 Ill. 135; U. S. v. Maragas, 390 F.2d 88; People v. Zimmer, 238 Ill. 607.

In Sherman v. The People, 210 Ill. 552 at page 557, the court said:

"Courts have power to punish, in certain cases, administrators, executors, guardians, masters in chancery, reporters, sheriffs, bailiffs, clerks, jurors, witnesses, attorneys and receivers. ... The extent to which the law of receivership has been developed by the courts is remarkable. Receivers are appointed by the court to become officers of the courts making the appointment even though their acts are generally ministerial ... Not only are they individually responsible, but other employees are governed by the same law; and the powers of the courts are almost unlimited and must, of necessity, be so for the proper administration of justice."

See also People v. White, 334 Ill. 465, 484; People v. Berof, 367 Ill. 454.

In Phelan v. Middlestates Oil Corporation, 154 F.2d 978, the court said, in answering an argument that federal law does not permit punishment of a federal receiver or permit receivers to avoid accounting for their actions, at page 1001:

"We think that it would be most unfortunate to apply such a rule to a wrongdoing federal receiver; it would do much to thwart the policy of inducing careful discharge of

> their duties by receivers. The doctrine, relative to receivers, of strict accountability, and of opposition to divided loyalties, is prophylactic; it aims not merely to punish actual evil in cases where it occurs but to avoid the 'tendency to evil in other cases'."

That same court in a second appeal involving the same subject matter said at 220 F.2d 593, 615:

> "For the court, in administering the estate in its custody for all the beneficiaries, must see to it that none of them suffers because of the misconduct of its receiver, and the discharge of that obligation should not depend upon their appearance in court to voice their objections to that misconduct ... Thus, if the judge learned of the misconduct from a wholly neutral source ... he should surcharge a receiver and distribute among all interested the money owing to the estate by the receiver because of that misconduct."

See also Jackson v. Smith, 254 U.S. 586; 65 L.Ed. 418.

Granite had, in 1976, filed a petition seeking to have the receiver punished for its contemptuous actions in the trial court in purchasing the

mortgages and in filing the foreclosure action thereon. The trial court refused to consider the petitions, saying that it had no jurisdiction so to do under the mandate of the Appellate Court which remanded with directions. Upon a subsequent appeal to the Appellate Court, that court found the actions of the receiver wrongful and in blistering language termed the conduct "reprehensible". That it should be disciplined for such action is obvious and clear.

Granite sought a contempt finding in the Appellate Court on the 28th day of September, 1979. That court said, in its supplementary opinion issued that date:

> "At the September 28, 1979, rehearing the defendants filed with this court a petition for an order of court finding the receiver and the plaintiff in contempt of court and for assessment of a fine of $10,000,000.00 as punishment therefor. We decline to consider

this petition at this time. If appropriate it may be refiled in the Circuit Court upon issuance of the mandate of this court."

The court did issue that mandate but it was recalled by the Illinois Supreme Court and petition for leave to appeal by FSLIC and Illini-PSL was later allowed. Should the Illinois Supreme Court affirm, the parties, including Granite, are nevertheless forever barred from proceeding with a contempt action against the receiver by the District Court order of October 2, 1979. This order, if allowed to remain in effect, will completely immunize and insulate the receiver from any disciplinary proceedings, whatsoever, on account of its breach of trust and loyality committed in the summer of 1976 and continuing from that date to the present time. That the District Court's order has interfered with the integrity of the

state court judicial process is abundantly clear.

This Court, in a 1977 opinion, Juidice v. Vail, 430 U.S. 327, 51 L.Ed. 2d 376, 97 S.Ct. 1211, said in discussing Younger v. Harris, 401 U.S. 37:

> "We now hold, however, that the principles of Younger and Huffman are not confined solely to the types of state actions which were sought to be enjoined in those cases. As we emphasize in Huffman, the 'more vital consideration' behind the Younger doctrine of non intervention lay not in the fact that the state criminal process was involved but rather in 'the notion of comity, that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will serve best if the states and their institutions are left free to perform their separate functions in their separate ways.' ..."

And at page 51 L.Ed. 384, the court said:

> "But the federal court cannot of course, interfere in a case where the proceedings were already pending in a state court. ..."

"These principles apply to a case in which the State's contempt process is involved. A State's interest in the contempt process through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue Federal claims within it, is surely an important interest. Perhaps it is not quite as important as is the State's interest in the enforcement of its criminal laws. Younger, Supra, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in Huffman, Supra. But we think it is of sufficiently great import as to require application of the principles of those cases. The contempt power lies at the core of the administration of a State's judicial system, ... Whether disobedience of a court-sanctioned subpoena, and the resulting process leading to a finding of contempt of court, is labeled civil, quasi-criminal, or criminal in nature, we think the salient fact is that Federal court interference with the State's contempt process is 'an offense to the State's interest ... likely to be every bit as great as it would be were this a criminal proceeding.' Moreover, such interference with the contempt process not only 'unduly interferes with the legitimate activities of the State' ... but also 'can readily be interpreted as 'reflecting negatively upon the State Court's

ability to enforce constitutional principles."

In Cicero v. Olgiati, 410 F.Supp. 1080 (U.S. Ct. S.D. N.Y., 1976), the court in analyzing Younger v. Harris and its meaning from a comity aspect said that:

> "The Supreme Court held that absent extraordinary circumstances, deference to the federal system of government, particularily respect for state judiciary's ability to determine federal issues arising before it, bars a federal district court from enjoining a pending state criminal prosecution.
>
> "The mandate to abstain for reasons of comity has also been extended to pending civil proceedings where the state is a party to a pending and uncompleted proceeding which is 'both in said of and closely related to criminal statutes' and 'akin to a criminal prosecution'."

The Court further said:

> 'Noting that the Supreme Court characterized disbarment proceedings as 'quasi-criminal' in nature ... the court emphasized that the interest of the state court in policing the integrity of its officers is 'at least as great as

the interest of the state in Huffman v. Pursue, because state courts are the only bodies which 'can impose sanctions upon those admitted to practice in its courts."

In Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316 (8th Cir. 1975), the court affirmed the District Court's denial of an injunction in which the petitioner sought to prevent the State of South Dakota from conducting a disbarment proceeding. The court held there:

"Before exercising its equitable power to enjoin the state proceeding, the District Court must find the plaintiff threatened with great and immediate irreparable injury that cannot be eliminated by his defense to the state proceeding. Younger v. Harris, 41 U.S. 37."

In Duke v. State of Texas, 477 F.2d 244 (5th Cir. 1973), the court, when asked to enjoin a proceeding in the state court, said, at page 248:

"We iterate that the Younger principles of equity, comity and federalism apply to federal inter-

vention in state 'civil' as well as 'criminal' proceedings, even where the exercise of First Amendment rights is involved; two of our sister Circuits have so held, Cousins v. Wigoda, 7 Cir. 1972, 463 F.2d 603, application for stay denied, 409 U.S. 1201, 92 S.Ct. 2610, 34 L.Ed.2d 15 (Rehnquist, Circuit Justice); Lynch v. Snepp, 4 Cir. 1973, 472 F.2d 769. In Younger, the Supreme Court made it clear 'that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.' 401 U.S. at 45, 91 S.Ct. at 751, 27 L.Ed.2d at 676. This interdiction of federal interference in state judicial proceedings is based on federalism concepts of comity and respect for state functions, op. cit. 401 U.S. at 44, 91 S.Ct. at 750, 27 L.Ed.2d at 675-676. In order to overcome it two express pre-conditions must be shown before relief may be granted to a federal plaintiff. First, the moving party must demonstrate that he will suffer irreparable injury if the federal court stays its hand, and second the moving party must demonstrate that he does not have an adequate remedy at law in the state courts, op. cit. 401 U.S. at 43-44, 91 S.Ct. at 750, 27 L.Ed.2d at 675."

In a Seventh Circuit case, decided in 1972, the court, in Cousins v.

Wigoda, 563 F.2d 603, in vacating a District Court injunction said at page 606:

> "Although a federal court has power to grant an injunction to stay litigation in a state court, ... principles of equity, comity and federalism dictate restraint in the responsible exercise of that power."

As the Illinois Appellate Court has found and reaffirmed, the FSLIC has committed a grievous wrong and continuing harm upon these defendants. The Appellate Court has made certain orders which, if that court is to have any integrity whatsoever, must be obeyed by its own receiver, the custodian of the property for the State of Illinois. The receiver is contumaciously defying the state court and has sought refuge in the U. S. District Court. That court has granted that refuge and made the injunction permanent on the 11th of October, 1979. The Court of

Appeals has sanctioned the injunction by its erroneous holding on the jurisdictional question. If this Court does not dissolve that injunction, the FSLIC will have successfully thwarted the Appellate Court of the State of Illinois and will have successfully breached its duty as receiver, in effect, thumbing its nose at the courts of Illinois. The U. S. District Court has undertaken to determine, without hearing, that the FSLIC is not guilty of the wrongful, reprehensible conduct as charged by the Appellate Court. It seeks to enter a permanent "not guilty" order in conformance with its own finding. We urge this court to protect the Appellate Court of Illinois, the other courts, and attorneys similarly enjoined, by striking down this injunction. The order which prevents Granite and its attorneys from resorting to legitimate

judicial processes of the State of Illinois is improper. Clearly, the interference between the Circuit Court of Madison County and its receiver is improper. The disregard for the specific findings of the Appellate Court of the State of Illinois is improper. This Court should exercise its supervisory power to prevent the United States District Court from exonerating FSLIC of its wrongful acts as state court receiver.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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62201
(618) 274-0434

Attorneys for Petitioner

March 23, 1981

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Defendants-Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff-Respondent, vs.

PSL REALTY CO., a corporation, et al,

Defendants-Respondents,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

ENTRY OF APPEARANCE

Now comes Rex Carr, a member of the Bar of this Court, entering his appearance as counsel for petitioners Granite Investment Company and James C. Green in the above captioned cause.

Rex Carr

REX CARR
COHN, CARR, KOREIN, KUNIN, SCHLICHTER & BRENNAN
412 Missouri Avenue
East St. Louis, Illinois 62201
Attorney for Petitioners

NO. .....

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Defendants-Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff-Respondent, vs.

PSL REALTY CO., a corporation, et al,

Defendants-Respondents,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

AFFIDAVIT

Rex Carr, a member of the Bar of this Court, being first duly sworn, deposes and states that he has knowledge that forty (40) copies of a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the above cause were enclosed in an envelope addressed to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C. 20544, with prepaid first class postage affixed thereto, and deposited in the

United States mail at St. Louis, Missouri, on March 23, 1981.

Rex Carr

Rex Carr
COHN, CARR, KOREIN, KUNIN, SCHLICHTER & BRENNAN
412 Missouri Avenue
East St. Louis, Illinois 62201

Attorney for Petitioners

SUBSCRIBED and SWORN TO before me this 23rd day of March, 1981.

Margaret Deatherage
Notary Public

NO._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Defendants-Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff-Respondent, vs.

PSL REALTY CO., a corporation, et al,

Defendants-Respondents,

THE HONORABLE CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS,

Respondents.

CERTIFICATE OF SERVICE

Rex Carr, a member of the Bar of this Court, hereby certifies that three copies of a Petition for Writ of Certiorari to the United States Court of

Appeals for the Seventh Judicial Circuit was served on the parties named below by depositing the same in the United States Mail at St. Louis, Missouri on March 23, 1981, in envelopes plainly addressed as shown below, with prepaid first class postage affixed thereto:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Mr. W. Stanley Walch
Thompson & Mitchell
ONe Mercantile Center, Suite 3400
St. Louis, Missouri 63101
Attorneys for Respondent, PSL Realty Co.

Mr. Robert W. Patterson
Hopkins, Sutter, Mulroy, Davis & Cromartic
One First National Plaza, Suite 5200
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Attorneys for Respondent, Federal Savings and Loan Insurance Corporation.

Hon. Tyrone C. Fahner
Attorney General
State of Illinois
500 South Second Street
Springfield, Illinois 62706
Attorney for the Justice of the Illinois Appellate Court for the Fifth District and all Judges of the Third Judicial Circuit of Illinois.

The above constitutes service on counsel for all parties known to be interested in this cause.

REX CARR
COHN, CARR, KOREIN, KUNIN,
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412 Missouri Avenue
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APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 79-2134, 79-2211, 79-2212 and 79-2303,

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff-Appellee,

v.

PSL REALTY CO., a corporation, et al.,

Defendants-Appellees,

GRANITE INVESTMENT COMPANY, a limited partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Defendants-Appellants,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS,

Appellants.

Interlocutory Appeal from the United States District Court for the Southern District of Illinois—No. A-CIV-76-79, J. Waldo Ackerman, Judge.

ARGUED JANUARY 25, 1980—DECIDED SEPTEMBER 12, 1980

Before SWYGERT, CUMMINGS and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* These consolidated appeals present for review a decade of litigation, whose odyssean

journey through the various state and federal courts sitting in Illinois was ultimately destined on a collision course between the two court systems and which achieved that destiny in a rather dramatic interim finale when, on October 2, 1979, the United States District Court for the Southern District of Illinois invoked its injunctive powers to enjoin the Illinois state courts from further interference with its jurisdiction over certain property subject to a mortgage foreclosure action instituted in the district court nearly four years earlier. Our jurisdiction is founded on 28 U.S.C. § 1292(a)(1), permitting an interlocutory appeal as a matter of right from the granting of an injunction. The sole issue before us is whether the district court erred in issuing the injunction. We affirm.

I

Although the final chapter of this case remains to be written, its history to date stands as a compelling testimonial to the maximum utilization of the American jurisprudential system, embracing as it does both the state and federal trial and appellate courts as well as the federal bankruptcy courts. For our purposes, the story begins in the early 1960's when appellant James C. Green entered into a debtor-creditor relationship with the Piasa Federal Savings and Loan Association ("Piasa"), in which first lien mortgages were executed in favor of Piasa to finance the development and construction by Green and his associates of several apartment complexes situated in Madison, Clinton, St. Clair, and Sangamon Counties, Illinois. Financial difficulties were encountered in the completion and operation of the units and restructuring of the debt and provision of additional construction funds became necessary. To that end, the parties entered into a lengthy and detailed agreement, termed the Base Agreement, on August 1, 1970.

Under its terms, title to the properties was conveyed to a newly formed corporation, PSL Realty Company, wholly owned by Piasa. PSL Realty Company ("PSL") then entered into contracts for deed to the same properties with Granite Investment Company ("Granite"), a limited partnership of which James Green was the principal. Granite was to manage the properties until such time as the pro-

vided payments were made and the other conditions imposed by the contracts for deed were fulfilled, upon which PSL would reconvey the properties to Granite. During this time PSL had an absolute right to all income generated by the properties. Piasa continued to hold the first lien mortgages as mortgagee.

The Granite management arrangement was not successful. The properties continued to experience grave financial difficulties and in 1971, the Federal Savings and Loan Insurance Corporation ("FSLIC") determined that Piasa was on the verge of insolvency. Pursuant to its powers under Section 406(f) of the National Housing Act, 12 U.S.C. § 1729(f), FSLIC procured the merger of Piasa into the Illini Federal Savings and Loan Association ("Illini"). Under the terms of the merger, Illini became the owner of the mortgages, forty-eight in number, upon the apartment units and a residence of James Green. Illini also became the sole owner of PSL which, under the Base Agreement, was the holder of legal title to the properties, subject to the contracts for deed with Granite, and entitled to the gross rentals from the operation of the units. At the time of the merger, the Green loans were in the area of $14 million and were seriously delinquent. As the principal inducement to Illini, FSLIC and Illini entered into a Contribution Agreement, which provided that FSLIC would subsidize Illini for certain losses incurred in connection with the non-earning assets it would acquire from Piasa. The agreement also granted FSLIC the option to terminate that subsidy by purchasing the non-earning Piasa assets from Illini at book value.

After the merger, the economic situation pertaining to the financial management and operation of the properties continued to deteriorate. Granite remained manager of the properties, but the units were incurring losses of approximately $30,000 per month. Mortgage delinquencies continued to mount, and matters reached a climax in March 1972. On March 27, PSL and Illini demanded the books and records from Granite, but they were refused. On April 11, 1972, PSL and Illini filed a four count complaint in the Circuit Court of Madison County, Illinois seeking an injunction requiring Granite and James Green to turn

over the books and records of Granite for examination, to refrain from collecting further rents, and to cease interference with PSL's collection of the rents. A temporary restraining order was issued to that effect upon posting of a $50,000 bond, security waived. On April 28, 1972, the trial court denied Granite's motion to dissolve the temporary injunction and granted the motion of PSL and Illini to appoint FSLIC, without objection by Granite, as receiver of the properties *pendente lite*. Pursuant to the powers accorded to it by the receivership order, FSLIC designated Illini as its local agent in the management of the receivership properties.

On May 23, 1972, Granite and Green commenced an interlocutory appeal challenging the issuance of the injunction and the appointment of the receiver. The matter was continued at the request of the parties and was finally argued to the Illinois Appellate Court for the Fifth District on March 31, 1976. On July 23, 1976 the appellate court reversed the order appealed from and dissolved the temporary injunction and receivership on the ground that these ancillary remedies were inappropriate in the absence of a complaint stating an underlying cause of action. The case was remanded to the circuit court solely for an accounting of the income and expenses of the receivership, for a determination of the distribution of the net income, and for the award of a fee to the receiver. *PSL Realty Co. v. Granite Investment Co.*, 42 Ill. App. 3d 697, 356 N.E.2d 605 (1976).

On August 13, 1976, PSL and Illini filed a petition for rehearing with the appellate court. On August 18, 1976, FSLIC exercised its contractual right under the Contribution Agreement to purchase the mortgages from Illini at the agreed price of $10,673,000, in order to reduce its obligation to indemnify Illini for losses on Piasa's non-earning assets. On August 26, 1976, FSLIC filed a suit in federal court to foreclose on the notes and mortgages encumbering the properties, and the subsequent actions of the federal and state courts precipitated the injunction order which is the subject matter of the instant appeal.

On August 31, 1976, Granite and Green also petitioned the Illinois Appellate Court for rehearing of its decision

dissolving the temporary injunction and receivership, asserting, among other claims, that FSLIC had acquired the mortgages and was prosecuting a foreclosure action in federal court, and that Granite was entitled to possession of the properties. On the same day, FSLIC petitioned the district court for an order authorizing it to remain in possession of the subject real estate as mortgagee. Granite opposed the petition on the grounds that FSLIC was estopped, by its conduct, from proceeding with foreclosure and that FSLIC had no legal right to purchase the mortgages in light of the state court's jurisdiction. On September 2, 1976, the district court entered an order authorizing FSLIC to remain in possession of the properties as mortgagee, but providing specifically:

> That this order shall become operative upon the effective date of the mandate from the Illinois Appellate Court for the Fifth District dissolving FSLIC's status as receiver of the subject properties.

Order of September 2, 1976 at 2-3. On September 13, 1976, the Illinois Appellate Court denied the petitions for rehearing in a supplemental opinion and the mandate issued on October 13, 1976. Having decided that it had the power to and would in fact assume jurisdiction over the properties of the then-dissolved receivership, the district court proceeded with the foreclosure action.

The focus of the litigation returned to the Circuit Court of Madison County, Illinois. On April 28, 1977, the circuit court denied the petitions of Granite and Green challenging the conduct of FSLIC as receiver and entered an order approving the receiver's final report and discharging the receiver effective retroactively to September 30, 1976. While the appeal by Granite and Green from this order was pending before the Illinois Appellate Court, the trial on the merits of the foreclosure case in federal court commenced. On November 16, 1978, FSLIC rested its case and Granite's motion for a directed verdict was denied. The trial was subsequently recessed and in the spring of 1979, the district court advised the parties that the trial would resume on September 24, 1979. On September 13, 1979, the Illinois Appellate Court entered its now controversial judgment from the appeal of the circuit court order dis-

charging the receiver. The appellate court held that FSLIC breached its fiduciary duty as a receiver by acquiring the notes and mortgages to the property and directed the circuit court to order FSLIC to credit its receiver's fee to the mortgages and to convey the notes and mortgages back to Illini. In all other respects the order appealed from was affirmed. *PSL Realty Co. v. Granite Investment Co.*, No. 77-125 (September 13, 1979).

On September 26, 1979, the district court entered an order confirming its jurisdiction over the parties and the possession of the properties and noted that it was compelled to do whatever was necessary to protect that jurisdiction. On the same day, the Honorable Charles E. Jones, Justice of the Illinois Appellate Court for the Fifth District, entered an order staying the September 13, 1979 decision of the appellate court. The Order for Stay enjoined FSLIC and PSL from proceeding with the foreclosure case in federal court and also restrained Illini, which was not a party to that action and against whom no relief had been awarded in the September 13, 1979 opinion. The Order for Stay further declared that any attempted future transfer of title to the properties by FSLIC, Illini, or the current legal title holder, PSL, would be void and directed that this cloud on the titles to the properties be recorded with the recorder of deeds in the respective counties in which the properties were situated.

On September 27, 1979, the district court was presented with the Order for Stay issued by Justice Jones of the Illinois Appellate Court. The district court admonished the parties to make every effort to avoid an unseemly conflict between the two court systems and, upon FSLIC's representation that it would seek a reconsideration of the Order for Stay by the three justices of the Illinois Appellate Court, the trial of the foreclosure action was again recessed to October 1, 1979.

On Friday, September 28, a special session of the Illinois Appellate Court was convened to entertain arguments on FSLIC's motion to reconsider and vacate the Order for Stay. Granite presented a petition to the court asking that FSLIC be held in contempt for purchasing the mortgages in 1976 and fined $10,000,000 and further that it be fined

$1,000,000 per day if it continued to prosecute the foreclosure case in federal court. On October 1, the appellate court issued an order by telephone to the parties which sustained the injunction against FSLIC, PSL and Illini from proceeding in federal court, but only until the issuance of the mandate, which was directed to issue *instanter*. Later that day the parties were advised that the court had decided to revise its order and that the telephone order was inoperative.

After being advised on October 1 of the appellate court's refusal to withdraw its Order for Stay, the district court reluctantly decided that an injunction pursuant to 28 U.S.C. § 2283 was necessary in aid of its jurisdiction. The district court found that the actions of the Illinois Appellate Court interfered with the property in its possession by threatening the parties with contempt and by placing a cloud upon the titles to the properties. The court drew upon the authority of 28 U.S.C. § 2283 and carefully tailored an injunction to prevent any further interference with its exclusive possession. The injunction restrained, among others, all Justices of the Illinois Appellate Court for the Fifth District and all Judges of the Illinois Circuit Courts receiving actual notice of the injunction,

> . . . from taking any action, without prior written permission of this court, which in any way, directly or indirectly, impinges upon, limits or otherwise interferes with the jurisdiction of this court in this cause . . . .

Memorandum Order and Injunction of October 2, 1979 at 12-13.

On October 3, 1979 the Illinois Appellate Court entered an order in the form of a "Supplemental Opinion," sustaining the injunction against FSLIC, PSL and Illini, to be operative *after* the issuance of the mandate which again was directed to issue *instanter*. Furthermore, the appellate court declined to remove its absolute restraint on the alienability of the properties.

On October 3, 1979, the parties to the foreclosure action appeared before the district court pursuant to its order for the resumption of the trial. At that time, Granite filed

a notice of appeal from the injunction order of the district court to this Court. It also filed a motion requesting a stay of the enforcement of that order and a postponement of the foreclosure proceedings pending Granite's appeal. The district court denied the motion for stay, but allowed Granite until October 5 to obtain a postponement of the proceeding directly from this Court, and ordered the trial to resume on October 9. On October 5, 1979, we denied Granite's application for a stay of the proceedings.

On October 9, 1979, Granite filed a debtor's petition to reorganize under Chapter 11 of the Bankruptcy Act in the United States Bankruptcy Court for the Southern District of Illinois. Later that day, Granite advised the district court of the petition and asserted that under Section 362(a) of the Act, the foreclosure proceedings were automatically stayed. The district court recessed the trial to determine whether or not it had jurisdiction to proceed with the foreclosure action under the Bankruptcy Act.

On October 11, 1979, the district court convened a scheduled hearing to show cause why the temporary injunction entered on October 2 should not be made permanent. The Attorney General for the State of Illinois appeared in behalf of the Justices of the Illinois Appellate Court for the Fifth District and the Judges of the Third Judicial Circuit of Illinois, and filed a motion to vacate the order and injunction of the district court. The district court denied the motion to vacate and, after hearing argument from the Attorney General and from counsel for Granite, made the injunction permanent by order entered October 11, 1979. The Attorney General, in behalf of the foregoing named judges, and counsel for Granite filed notices of appeal from that order to this Court. These appeals have been consolidated for decision by this Court.

II

The sole issue for review in these interlocutory appeals is whether the district court erred in entering the permanent injunction order. Appellate review of an injunction order is limited to the determination of whether the district court abused its discretion in deciding that the circumstances of the case justified injunctive relief. *Doran v.*

Salem Inn, Inc., 422 U.S. 922, 931-932 (1975); *Kolz v. Bd. of Ed. of the City of Chicago*, 576 F.2d 747, 748 (7th Cir. 1978). We conclude that the circumstances in this case fully warranted injunctive relief and that the injunction entered by the district court constituted the sound exercise of its judicial discretion.

As a preliminary matter, we address the appellant's argument that the district court lacked subject matter jurisdiction in this case since such a finding would be dispositive of the remaining claims of error asserted on appeal. The appellants argue that the Illinois Circuit Court for Madison County acquired jurisdiction over the properties by its appointment of a receiver on April 28, 1972, and that, under the common law of receivers, the properties have remained in the exclusive possession of the state court because the receiver has not been discharged and the receivership property has not been returned to the original owner or to another party pursuant to court order. Accordingly, the appellants contend that the district court was incapable of obtaining exclusive jurisdiction over the properties in the foreclosure action and was therefore without power to enter an injunction in aid of jurisdiction it never acquired. The appellees, also in reliance on the law of receivers as well as the opinions of the Illinois Appellate Court in this case, contend that the state court's control over the properties was surrendered no later than October 13, 1976, the date the mandate of the Illinois Appellate Court dissolving the receivership was filed in the circuit court. With the dissolution of the receivership on October 13, the appellees argue that the district court properly acquired jurisdiction over the *res* by its order effective on that date, and that what remained in the state court was an exclusively *in personam* proceeding based on that court's residual jurisdiction over its receiver to require an accounting.

As a general rule, when a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession in receivership and appointed a receiver, the property is *in custodia legis* and is thereby withdrawn from the jurisdiction of all other courts. The receiver is an officer of the court and subject to its orders in relation

to the property for which he is responsible until discharged by the court. Moreover, unless the receiver has made a disposition of the property by order of the court to the original owner or to another party, upon the receiver's discharge the property remains in the custody of the court. When the receiver in obedience to a court order has so disposed of the property in receivership, his liability and responsibility as receiver to that property ceases and since the property is no longer *in custodia legis*, the receivership is terminated. However, an *in personam* action against the receiver concerning a breach of his fiduciary duties to the receivership property may nevertheless be maintained subsequent to his discharge. *See* Clark, *Law of Receivers*, Section 692.1 (3d ed. 1959); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 164 F.Supp. 655 (S.D.N.Y. 1958), *aff'd*, 277 F.2d 462 (2d Cir. 1960) (*per curiam*).

In the instant case, although the Illinois Appellate Court dissolved the receivership by its mandate of October 13, 1976, the receiver was not discharged because the appellate court, in its opinion of September 13, 1979, reversed and remanded the April 1977 order of the circuit court discharging the receiver. However, no further action was taken by the circuit court because the appellate court subsequently stayed its decision rendered on September 13. Thus, under an application of the foregoing principles to the circumstances in this case, the receivership property would be deemed to remain in the custody of the circuit court until such time as the receiver is discharged and the receivership necessarily terminated by a court order directing a disposition of the property.

However, we find the appellants' reliance on these principles to be misplaced in the context of this case for the reason that the state court failed to acquire possession of the properties in the first instance. On October 13, 1976, the Illinois Appellate Court issued its mandate dissolving the state trial court's injunction and appointment of the receiver on the ground that no pending dispute existed as to the control or ownership of the properties or the mortgages encumbering them. *PSL Realty Co. v. Granite Investment Co.*, 42 Ill. App. 3d 697, 356 N.E.2d 605 (1976). Since no complaint relating to the merits of the case had

been filed in the trial court before or after it ordered injunctive relief and a receivership, the appellate court held that these orders were improvidently granted under the established rule that such ancillary remedies are inappropriate in the absence of a substantive cause of action. 356 N.E. 2d at 607-609. It is equally settled that where, as here, the court lacks jurisdiction to adjudicate the principal matter, its orders purporting to grant the ancillary relief of temporary receivership are likewise beyond its jurisdiction and as such are *void ab initio*. *Firebaugh v. McGovern*, 404 Ill. 143, 88 N.E.2d 473 (1949). Since the Circuit Court of Madison County was found to be without jurisdiction to award the ancillary remedy of receivership, its order placing the properties in receivership and appointing FSLIC as receiver was void. Since the state court was not a court of competent jurisdiction exercising control over the properties which would preclude the institution of an action concerning the properties in federal court, the district court was free to assert its exclusive jurisdiction over the properties in the foreclosure suit, and appropriately did so by its order effective October 13, 1976.

This result is consistent with *Doyne v. Saettele*, 112 F. 2d 155 (8th Cir. 1940), a remarkably analogous case. In that case, the St. Louis City Circuit Court entered a decree finding a partnership had been dissolved and appointed a receiver for the assets. The Missouri Supreme Court ordered the receivership dissolved on the ground that the petition upon which the receiver had been appointed failed to state a cause of action and thus the circuit court was without jurisdiction to appoint a receiver. Before the mandate of the supreme court was filed, an action was commenced in the federal court seeking an accounting, a liquidation of the assets, and a distribution of the net income. Shortly thereafter, the district court issued an injunction restraining the parties from interfering with its jurisdiction over the assets which had previously been in the possession of the state court.

The Court of Appeals for the Eighth Circuit affirmed the district court's exercise of its injunctive powers in aid of its jurisdiction, and specifically rejected the applicability of the principle that because the state courts had

first acquired jurisdiction of the property involved they were entitled to retain it exclusively against all other courts. *Doyne, supra* at 160. The court of appeals reasoned that because the Missouri Supreme Court had ruled that the receivership must be dissolved, the state court was not a court of competent jurisdiction enabling it to exercise exclusive control over the property which barred an action in federal court concerning the same property. This conclusion was reached despite the fact that the federal court had acted before the mandate of the Missouri Supreme Court had been issued and that "certain acts remained to be done by the Missouri courts to make the writ [dissolving the receivership] completely effective." *Doyne, supra* at 161.

Having determined that the district court properly acquired subject matter jurisdiction over the properties involved in this case, it remains to be determined whether the district court properly invoked its injunctive powers to prevent interference with its exclusive possession by the state courts of Illinois.

III

That the district court has the power to enjoin a party to an action before it in aid of its jurisdiction cannot be disputed. 28 U.S.C. § 1651; *Ex Parte Baldwin,* 291 U.S. 610 (1934). It is also clear that the district court has the power to enjoin the state courts of Illinois pursuant to Title 28, United States Code, Section 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction . . . .

28 U.S.C. § 2283. *See* 14 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 3631 at p. 16 (1976); *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941).

The mere power to take such action is not, of course, sufficient to sustain the entry of the injunction. The circumstances precipitating the injunction must also be appropriate for injunctive relief. In this case the district court found itself compelled to invoke its injunctive powers

to protect its jurisdiction under the established principle that "when a court of competent jurisdiction has obtained possession, custody, or control of property, that possession may not be disturbed by any other court." 14 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3631 at p. 6 (1976). *See, e.g., Palmer v. Texas*, 212 U.S. 118, 129-130 (1909).

The Illinois Appellate Court, in its Order for Stay of September 26, 1979 effectively enjoins FSLIC and PSL Realty Company, parties to the foreclosure action, from proceeding with that action in federal court. Further, FSLIC is restrained by that order from transferring the properties, which are subject to the jurisdiction of the district court, although the appellate court's order of September 13, 1979 directed FSLIC to reconvey the properties to its predecessor. Finally, the appellate court decreed that all further attempts to convey title to the properties would be void and ordered that this cloud on the titles be recorded in each of the Illinois counties in which the properties are located. It requires no citation of authority to support the district court's conclusion that these acts interfered with its exclusive possession and control of the same properties and mortgages. We therefore hold that the district court, in the sound exercise of its discretion, properly invoked its injunctive powers to protect its jurisdiction from further interference by the Illinois state courts.

IV

We have carefully considered the other arguments advanced by the appellants and in view of the record find them to be equally without merit. For the foregoing reasons, the judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 23, 1980.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America, Plaintiff-Appellee, Nos. 79-2134, 79-2211, 79-2212 v. PSL REALTY CO., a corporation, et al., Defendants-Appellees, GRANITE INVESTMENT COMPANY, a limited partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEEL CONSTRUCTION CO., Defendants-Appellants, THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR., and	On Petition for Rehearing and Suggestion for Rehearing En Banc.

all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS,
Appellants.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendants-Appellants James C. Green, Granite Investment Company and Howard Steele Construction Company, Inc. and by Appellants The Hon. Charles E. Jones, The Hon. John M. Karnes, the Hon. George W. Kasserman, Jr., and all other Justices of the Illinois Appellate Court for the Fifth District, The Hon. Victor J. Mosele, and all Judges of the Third Judicial Circuit of Illinois, no judge in active service has requested a vote thereon, */ and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*/ The Hon. Harlington Wood, Jr., did not participate in consideration of the petition for rehearing en banc.

APPENDIX C

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Plaintiff,

v.

PSL REALTY CO., a corporation, et al,

Defendants.

No. A-Civ-76-79.

United States District Court,
S. D. Illinois,
Alton Division.

Oct. 2, 1979.

MEMORANDUM ORDER AND INJUNCTION

ACKERMAN, District Judge.

I. Factual Background

This is a mortgage foreclosure action relating to several apartment complexes located in Madison, Clinton, St. Clair and Sangamon Counties of Illinois. A brief factual analysis is necessary to fully appreciate the delicate issues which now confront this Court.

As relevant here, all parties agree

the properties here involved experienced grave financial difficulties. One of the defendants in this action, James C. Green, has reportedly admitted that in March of 1972 the apartments were losing about $30,000 per month. As a result of these financial problems, an action relating to the properties was filed in the Circuit Court of Madison County, Illinois, and during the course of that litigation the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed by the circuit court as receiver of all the properties here involved. On appeal, however, the Illinois Appellate Court for the Fifth District ordered the receivership dissolved because the plaintiffs there had sought only ancillary and temporary relief--no attempt had been made to obtain relief on the merits of any claimed cause of action. PSL

Realty Co. v. Granite Investment Co., 42 Ill.App.3d 697, 1 Ill.Dec. 417, 356 N.E.2d 605 (5th Dist.1976). The case was ordered remanded to the circuit court for action relating to the receiver's final report and discharge.

Both plaintiffs and defendants in the state court proceedings filed motions asking the Illinois Appellate Court to consider its order in which, inter alia, the receivership was dissolved. While motions to reconsider were pending and before the Illinois Appellate Court's mandate issued, FSLIC purchased the mortgages on all the apartments in the receivership for a purchase price of approximately $10.5 million. Following this purchase, on August 26, 1976, FSLIC filed this mortgage foreclosure action in federal court.

By order of September 2, 1976, this

Court granted FSLIC possession of the properties here involved as mortgagee in possession. That order, however, was specifically conditioned upon the mandate of the Illinois Appellate Court in dissolving the receivership becoming effective. That mandate of the Illinois Appellate Court effectively dissolving the receivership was issued on October 13, 1976, and FSLIC took possession of the properties as mortgagee in possession under the auspices of this Court at that time. This fact was recognized in the Madison County Circuit Court's order of April 13, 1977 when that court stated "that foreclosure proceedings have been filed upon properties presently the subject matter of this receivership and said properties are now possessed by FSLIC, as mortgagee, in the Federal Court." Since the dissolution of the

receivership, this Court has entertained several weeks of proceedings, including both testimony of witnesses and oral argument by counsel, in what has obviously evolved into an extremely complicated foreclosure action. FSLIC remains in possession of the properties as the mortgagee in possession of this Court.

II. Current Controversy

The current controversy before this Court stems from an order of the Illinois Appellate Court for the Fifth District entered on September 13, 1979. The case was there before the Appellate Court for consideration of matters relating to the receiver's final report and discharge. In its opinion, the Appellate Court, speaking through Justice Charles E. Jones, condemns as "reprehensible" the actions of FSLIC in purchasing the mortgages and filing this

foreclosure action while it was serving as receiver of the properties for the state court. The Appellate Court orders the case remanded to the Circuit Court of Madison County, Illinois with directions for that court to enter an order requiring that FSLIC reconvey the property to its predecessor before it can be discharged as the court's receiver. Further, FSLIC is denied all fees and compensation for its services as receiver because of its "misconduct and indiscretions incompatible with its position as an officer of the [state] court."

On September 24, 1979, this Court heard arguments related to the effect, if any, of the Appellate Court's September 13 order upon this Court's ability to proceed in this action. By order of September 26, 1979, after careful con-

sideration of the pleadings, oral arguments and applicable law, this Court found that it had properly acquired jurisdiction of this foreclosure action and indicated that it was therefore incumbent upon this Court to protect that jurisdiction.

This Court recognized in its September 26 order the wisdom and necessity of the well-established rule of law providing that "when a court of competent jurisdiction has obtained possession, custody or control of property, that possession may not be disturbed by any other court." 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3631, at 6 (1976). See, e. g., Palmer v. Texas, 212 U.S. 118, 129-30, 29 S.Ct. 230, 53 L.Ed. 435 (1909). However, I found that this principle did not preclude this action

in this court under the facts here presented. Accord, Doyne v. Saettele, 112 F.2d 155 (8th Cir. 1940).

I specifically rejected the contention that because a final accounting of the state court receiver was outstanding, and therefore the receiver had not been discharged, this Court could not exercise its jurisdiction over the subject matter of this action. Rather, I there found the telling factor to be the control of the property. See Ryan v. First Pennsylvania Banking & Trust Co., 519 F.2d 572, 575 (3d Cir. 1975). I further found that the state courts had relinquished all control or possession of the properties on October 13, 1976 when the Illinois Appellate Court mandate dissolving the receivership issued. At that point, in accordance with this Court's order of September 2, 1976,

this Court assumed jurisidction over the properties and FSLIC took possession as mortgagee in possession.

Thus, this Court did not interfere with the state court's jurisdiction over the properties here involved so as to violate the rule requiring that only one court control the property. Instead, this Court exercised its jurisdiction over the property when the state courts had relinquished such control with the dissolution of the receivership, notwithstanding the fact that a final report of the receiver remained outstanding.

Finally, in this Court's September 26 order, this Court indicated its reluctance to enter into a conflict with its sister courts of the State of Illinois. At the same time, however, it was made abundantly clear that this Court believed

it had jurisdiction of this action and all necessary steps would be taken to protect that jurisdiction.

Substantial problems are presented by the "Order for Stay" entered by the Illinois Appellate Court on September 26, 1979. While purporting to recognize that court's inability to limit the jurisdiction of this Court, the Illinois Appellate Court proceeds to effectively enjoin FSLIC and PSL Realty Company, both of which are parties here, from proceeding with this action in the federal court. The Appellate Court's action is premised on the tenet that the state court controls its own receiver, an officer and arm of that court. The crucial inquiry here presented is whether this state court action improperly impinges upon the jurisdiction of this Court.

III. Analysis

First, counsel for defendants James C. Green and Granite Investment Company urges this Court to reconsider its September 26 order finding that this Court has jurisdiction over the subject matter of this cause. This motion is grounded upon the precept, earlier rejected by this Court, that because the state court receiver has not yet been discharged, that court retains first and therefore exclusive jurisdiction of the property here involved. See 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3631, at 6 (1976); Palmer v. Texas, 212 U.S. 118, 129-30, 29 S.Ct. 230, 53 L.Ed. 435 (1909).

Having once again carefully considered the issues here involved in light of the applicable law, I conclude the defendants' motion must be denied

and hereby reaffirm the findings of this Court's order of September 26 for the reasons stated therein and briefly reiterated above. In so ruling, I note the distinguishing factors which counsel suggests renders Doyne v. Saettele, 112 F.2d 155 (8th Cir. 1940), inapposite, but nevertheless adhere to the analogy between the two cases. Again I emphasize the controlling factor and the basis for the Palmer rule, control over the property, is absent in the state court proceedings here following the Illinois Appellate Court's dissolution of the receivership.

To hold this Court lacks jurisdiction as suggested by counsel for James C. Green and Granite Investment Company would prove untenable. Such a determination would mean that no court was exercising control over the properties

here involved, but would also preclude FSLIC from foreclosing on the allegedly defaulted mortgages. This is true despite the fact FSLIC, the owner of the mortgages, had invested substantial amounts of money into the failing properties in an effort to make them succeed. This would mean, in effect, that the properties were beyond reach of the mortgage holder because of its "reprehensible" conduct, even though the mortgages were allegedly in default.

This anomaly is highlighted by the fact that counsel for defendants Green and Granite Investment Company apparently filed on September 28 a petition in state court seeking an order finding FSLIC and PSL Realty Company in contempt of that court for proceeding with this foreclosure action. In light of this Court's September 26 order, and

especially in light of this Court's September 24 discussion with counsel of the suggestion that the parties here may be subject to contempt in state court for proceedings here, I find this action by counsel, if true, to be a direct affront to the jurisdiction of this Court. Such actions themselves might be labeled reprehensible but, whatever the label, will not be countenanced by this Court. However, in light of this order and the fact that the parties here have not been irreparably harmed, no action will be taken by this Court at this time. Counsel is duly warned, however, that any similar conduct in the future will be dealt with summarily by this Court.

I note, parenthetically, that all of the facts relating to this foreclosure proceeding, including the conduct of

FSLIC which the Illinois Appellate Court has found to be reprehensible, are before this Court. It is up to this Court, not the state courts, to determine whether the federal party can proceed with this foreclosure proceeding. This Court will make the necessary determinations after considering all of the evidence here involved. Without intimating any view on the merits of this question, I note there is apparently at least grounds for dispute as to the impropriety of these acts based upon the fact that the Circuit Court of Madison County originally approved the receiver's final report, although the same actions now said to be "reprehensible" were also presented to that court. Further, I believe there is a serious question as to whether, after the outlay of millions of dollars, FSLIC could, even if it so

desired, simply walk away from this action and thereby, in effect, forfeit the properties to the parties who are alleged to be in default under the mortgages.

Finally, this Court takes little consolation from counsel's suggestion that FSLIC's alternative to its "reprehensible" conduct was simply to ask the state court to approve its actions in purchasing and foreclosing on the mortgages. First, the Illinois Appellate Court had ordered the receivership dissolved and, as discussed above, thereby relinquished control of the properties. Further, in light of the Appellate Court's order of September 13, this would apparently have been a futile task. In any event, as stated above, I believe a determination of whether FSLIC can proceed with this foreclosure action is a matter

for this Court's consideration, not that of the state court.

IV. Protection of this Court's Jurisdiction

For the foregoing reasons and based upon the rationale of this Court's order of September 26, 1979, this Court remains convinced that it has properly acquired jurisdiction of this foreclosure action. Given this finding, it is now incumbent upon this Court to protect that jurisdiction even if, as is apparently true in this case, a party or another court disagrees with this determination. This Court necessarily has the power to determine its own jurisdiction. See Fauntleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908). If parties or others subject to this Court's orders disagree with this Court's conclusion, their remedy is to appeal and they cannot be allowed to

simply pursue other avenues in conflict with this Court's orders. They must either abide by this Court's order or appeal.

First, it is clear to me that recent events in the Illinois Appellate Court for the Fifth District do in fact impinge upon this Court's jurisdiction. For example, the contempt petition reportedly filed in the state court amply illustrates the untenable predicament confronting FSLIC and PSL Realty Company. If they choose to proceed with this action, which is properly before this Court, these parties fact the potential of being held in contempt of the state court. Certainly the real possibility of facting contempt charges chills the participation of those parties in this proceeding. Further, the Appellate Court's order of September 13, 1979,

ordering FSLIC to reconvey the properties, though apparently not yet final, arguably impinges upon this Court's jurisdiction which is based upon the status of the federal entity, FSLIC, as a party.

Certainly the Illinois Appellate Court's order of September 26, 1979, is a direct attempt to limit the proceedings in this Court. FSLIC and PSL Realty Company, parties to this action, are there effectively enjoined from proceedings in this action. Further, FSLIC is precluded by that order from transferring the properties which I have found to be within the jurisdiction of this Court, although as noted above the Appellate Court's order of September 13 directs FSLIC to reconvey the property to its predecessor. Finally, title to the property under the control of this Court may have already been clouded by

the recording of the Appellate Court's order of September 26 in each of the Illinois counties in which this property is located in accordance with that court's order.

I note also that, as if the above infringements upon this Court were not enough, this Court has lost two weeks of trial time which had been set aside specifically for this foreclosure action. This fact alone would justify action by this Court to protect its jurisdiction.

Having thus found that this Court properly has jurisdiction of this action, and that this jurisdiction is being improperly impinged upon, the question becomes what needs to be done to eliminate this interference and thereby allow this action to proceed. As indicated in this Court's order of September 26,

the power of this Court to protect its jurisdiction under these circumstances derives from two sources.

First, somewhat ironically, the rule illustrated by Palmer v. Texas discussed above and relied upon by counsel for Green and Granite Investment Company in support of the argument for exclusive state court jurisdiction now applies to protect this Court's jurisdiction in dealing with the subject matter of this case. That is, based upon this Court' determination that jurisdiction is proper here, this Court's possession of the property is exclusive and may not be disturbed by any other court. See generally, 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §3631, at 6 (1976). See Toucey v. New York Life Insurance Co., 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100

(1941); 1A(pt.2) Moore's Federal Practice ¶¶0.214-0.218 (1979). Secondly, a specific provision of the United States Code empowers this Court to enjoin state court proceedings where such action is necessary in aid of the federal court's jurisdiction. 28 U.S.C. § 2283. See generally, 1A (pt. 2) Moore's Federal Practice ¶¶0.208[3.-1], [3.-4] (1979).

Having afforded due regard to the general principle that state judicial proceedings should be free from federal interference if at all possible, I nevertheless conclude that an injunction of the state court proceedings is required in this case to effectuate this Court's jurisdiction. I enter this order most reluctantly because of my high regard for my colleagues on the state courts of Illinois. However, I do so

only because I am left with no alternative.

V. Injunctive Relief

Accordingly, IT IS HEREBY ORDERED that Justices Charles E. Jones, John Karns, and George W. Kasserman, Jr., and all other justices of the Illinois Appellate Court for the Fifth District, and all parties to this action, together with their officers, agents, servants, employees, and attorneys as well as persons acting in their stead or in active concert or participation with them, including judges of the state courts of Illinois, who receive actual notice of this order, by personal service or otherwise, are hereby enjoined from taking any action, without prior written permission of this Court, which in any way, directly or indirectly, impinges upon, limits, or otherwise interferes with

the jurisdiction of this Court in this cause, including but not limited to:

1. Enforcing or attempting to enforce the "Order for Stay" entered by Justice Charles E. Jones of the Illinois Appellate Court for the Fifth District on September 26, 1979 in PSL Realty Co. v. Granite Investment Co., No. 77-125 or any prior or subsequent order relating to the subject matter of said order;

2. Enforcing or attempting to enforce the order entered by Justice Jones, with Justices Kunce and Kasserman concurring, in the Illinois Appellate Court for the Fifth District on September 13, 1979 in PSL Realty Co. v. Granite Investment Co., No. 77-125;

3. Restraining, limiting or otherwise preventing the parties and attorneys in this action before this Court, for any reason whatsoever, from further proceeding with this cause, by use of contempt proceedings, trial, fine, punishment, imprisonment or by means of any other sanction whatosever.

IT IS FURTHER ORDERED that the parties to this action and those individuals subject to the above-referenced injunctions shall

SHOW CAUSE, if any there be, why this injunction should not be made permanent at a hearing to be held on Thursday, October 11, 1979, at 3:00 p. m. in the United States District Court at Springfield, Illinois. At that hearing, this Court will also address the issue of whether the scope of this injunction need be broadened or narrowed in order to accomplish its purpose.

IT IS FURTHER ORDERED that a copy of this order be personally served upon the parties to this action, or their attorneys, in open court on Wednesday, October 3, 1979.

IT IS FURTHER ORDERED that the United States Marshall shall forthwith cause a true copy of this injunction and order to be personally served upon each of the above-named Justices of the Illinois Appellate Court for the Fifth District,

and upon all other Justices of the Illinois Appellate Court for the Fifth District by delivering a true copy of this injunction and order to the Honorable Walter Simmons, Clerk of said Appellate Court in Mt. Vernon, Illinois, and upon all judges of the Third Judicial Circuit of Illinois by delivering a true copy of this injunction and order to Chief Circuit Judge Victor J. Mosele in Edwardsville, Illinois.

APPENDIX D

42 Ill. App.3d 697
356 N.E.2d 605

PSL REALTY COMPANY, a corporation, and Illini Federal Savings & Loan Association, a corporation of the United States of America, Plaintiffs-Appellees,

v.

GRANITE INVESTMENT COMPANY, a limited partnership, et al, Defendants-Appellants.

No. 72-158.

Appellate Court of Illinois,

Fifth District.

July 23, 1976.

Supplemental Opinion on Denial of Rehearing
Sept. 23, 1976.

JONES, Justice.

This is an appeal from an order of the trial court denying defendants' motion to dissolve a temporary injunction and appointing a receiver. This case presents the question: May a party seek the relief of a temporary injunction and the appointment of a receiver pendente lite without concurrently seeking a de-

termination of the merits and the ultimate rights of the parties regarding the cause in issue?

On April 11, 1972, plaintiffs, P.S.L. Realty and Illini Federal Savings and Loan Association (hereinafter "Illini"), filed a four-count complaint seeking an immediate temporary injunction, without notice and without bond, against defendants, Granite Investment Company (hereinafter "Granite"), James C. Green, Darryl Layman, and First National Bank in Madison (hereinafter "Bank"). Granite is a real estate firm consisting of a general partner, Green, and several limited partners, including Layman. Bank is the depository of certain funds of Granite. P.S.L. Realty is the seller, and Illini the financing institution, with respect to the sale of Granite of certain property (valued at approximately sixteen million dollars) under several contracts

for deeds.

On the date the complaint was filed, the court, without notice to defendants, granted the temporary injunction exactly as requested by plaintiffs, upon plaintiffs' posting bond of fifty thousand dollars, "security waived." The injunction ordered Granite, Layman, and Green to refrain from collecting or attempting to collect any rents due or to become due on the properties in question and from interfering with the attempts of plaintiffs to collect such rents, and directed Granite, Layman, and Green to turn over to plaintiffs any rents already collected. The court also directed Granite, Layman, and Green to turn over their books and records for examination by plaintiffs, and directed Bank to hold any funds in the account of Granite until further order of the court.

Granite and Green were served with

the writ of injunction on April 17, 1972. They then filed a motion for change of venue and a motion to dissolve the temporary injunction. The change of venue was granted and on April 21, 1972, a hearing commenced on the motion to dissolve. On April 26, during a resumed session of the hearing, plaintiffs made an oral motion for appointment of a receiver. By its order entered on April 28, 1972, the court denied the motion to dissolve and appointed the Federal Savings and Loan Insurance Gorporation temporary receiver of Granite. Granite and Green filed their notice of interlocutory appeal pursuant to Supreme Court Rule 307 (a) on May 23, 1972. At the same time, Layman filed a motion to dissolve the injunction issued against him. The next day this motion was allowed. Plaintiffs were subsequently allowed leave to file an amended complaint as to Layman, which

they did. However, we need not concern ourselves with that matter, since only Granite and Green are appellants in the cause presently before us.

Defendants have raised several issues in this appeal. However, because of the nature of this case and the manner in which we have chosen to deal with it, we need not discuss all those issues. Initially we note that this case was first set for oral argument in October of 1972, and thereafter was again set for oral argument on several occasions. However, upon the occasion of each setting the oral argument was continued at the request of the parties because a settlement of the matters involved was imminent. The negotiations for a settlement proved fruitless, and the parties requested that the case again be set for oral argument. Consequently, the case was finally orally argued on March 31, 1976.

Although approximately four years had passed from the time the temporary injunction was issued and the receiver appointed until the time of the oral argument, during the argument the attorneys for the respective parties made it clear to this court that no further action had been taken in the trial court with respect to the substantive matter in dispute. Although the trial court below had issued what it termed a "temporary injunction," no complaint relating to the merits of this case had been filed at or before the time the injunction was granted and, apparently, none has been filed since. Plaintiffs' complaint for injunction made no reference to a pending or contemplated action upon the merits of the disputed matter. From the fact of plaintiffs' complaint and plaintiffs' subsequent oral motion for the appointment of a receiver, it appears that the

injunctive relief and receivership constituted the only relief plaintiffs wanted. The lack of further action during the four years that have elapsed since the time plaintiffs' requested relief was granted clearly indicates that the injunction and receivership, although termed by the court "temporary," amounted to the only relief plaintiffs wanted, and, for that matter the only relief they would ever want.

It is established that a temporary or preliminary injunction should not be granted where its effect would be to give all the relief that could be obtained after a final hearing on the merits of the dispute. (People's Gas Light & Coke Co. v. Cook Lumber Terminal Co., 256 Ill. App. 357; Cassidy v. Triebel, 337 Ill. App. 117, 85 N.E.2d 461; Knuppel v. Adams, 12 Ill. App.3d 708, 298 N.E.2d 767.) The purpose of a preliminary injunction is not to finally decide the controverted facts or

merits of a case. (Lonergan v. Crucible Steel Co. of America, 37 Ill.2d 599, 229 N.E.2d 536.) The preliminary injunction is merely provisional in nature and concludes no rights (Nestor Johnson Mfg. Co. v. Goldblatt, 371 Ill. 570, 21 N.E.2d 723; Schuler v. Wolf, 372 Ill. 386, 24 N.E.2d 162), its office being merely to preserve the status quo until a final hearing on the merits. (Dunne v. Rock Island County, 288 Ill. 359, 123 N.E. 501; Duval v. Severson, 15 Ill. App.3d 634, 304 N.E.2d 747.)

That a receivership is of the same nature and serves a similar function has been well established.

> "By the weight of authority it is a well-recognized province of equity jurisdiction to give aid to an action in another court either by injunctive process or by appointment of a receiver, whenever either or both of these remedies are necessary to preserve the existing status of the property until the proper distribution of the property has been determined in litigation then pending respecting the property,

provided irreparable damage may result if the existing status of the property is not preserved. Such an injunction is merely a mode by which the court preserves the property in dispute, with the least injury to all parties, until it can finally determine their respective rights and upon such a hearing, if a perpetual injunction is ordered, the defendant may be required to restore the status." 2 Puterbaugh, Chancery Pleading and Practice (7th Ed.), p. 626.

"By the weight of authority it is a well-recognized province of equity jurisdiction to give aid to an action in another court, either by injunctive process or by the appointment of a receiver whenever either or both of these remedies are necessary to preserve the existing status of property until the proper disposition of the property has been determined in litigation then pending respecting the property, provided irreparable damage may result if the existing status of the property is not preserved." Kulwin v. Harsh, 232 Ill. App. 419, 423-424.

To the same effect is People ex rel. Hoagland v. Streeper, 12 Ill.2d 204, 211, 145 N.E2d 625, 628-629. To say that a "temporary" injunction and receivership are "provisional" in nature, or that they are

used "in aid to" an action, or that their function is "to preserve the existing status of property until" some litigation determines the proper disposition of the property, is merely to say that a "temporary" injunction and a receivership are ancillary remedies and cannot be maintained as the sole relief sought. That this is so, subject to a few specific exceptions in cases of waste and other similar torts, has been often stated.

> "/S/uch matters as a receivership and preliminary injunction cannot per se be the subject of suit in equity." De Rees v. Costaguta, 2 Cir., 275 F. 172, 175-176.

As to the appointment of a receiver, the court in Davis v. Jacksonville & P. Ry. Co., 180 Ill. App. 1, 12 pronounced:

> "That the general rule is, that the appointment of receivers is an ancillary remedy in aid of the primary object of litigation between the parties, and such relief must be germane to the principal suit; and a suit can-

> not be maintained under this general rule where the appointment of a receiver is the sole primary object of the suit and no cause of action or ground for equitable relief otherwise is stated."

A similar statement was made in Gauer v. Voltz, 190 Ill. App. 189.

As to a preliminary injunction, sometimes referred to as an injunction pendente lite, the court in Lambert v. Alcorn, 144 Ill. 313, 330, 33 N.E. 53, 58, stated:

> "/A/n injunction pendente lite was a mere ancillary writ, which the complainants were at liberty to apply for or not, as they saw fit. Its only office was to preserve the status quo until a final hearing could be had."

Numerous other authorities support the proposition that a preliminary injunction and a receivership are merely ancillary remedies and cannot constitute the ultimate relief afforded in a particular dispute, except, as we have already stated, in cases of certain torts such as waste.

For example, see: Baker v. Backus' Administrator, 32 Ill. 79; Chicago Ry. Equip. Co. v. Nat'l. Hollow Brake Beam Co., 141 Ill. App. 572, aff'd 239 Ill. 111, 87 N.E. 872; Hillmer Co. v. Behr, 196 Ill. App. 363; Crenshaw v. Looker, 185 Mo. 375, 84 S.W. 885; Bledsoe v. Grand Lodge of United Bros. of Friendship, (Tex. Civ. App.) 53 S.W.2d 73; 26 A.L.R. 33, sec. I, p. 35; 77 A.L.R. 717; 27 Am. Jur.2d Equity, sec. 11, p. 529; 42 Am. Jur.2d Injunctions, sec. 11, p. 737; 65 Am. Jur.2d Receivers, sec. 25, p. 878; 75 C.J.S. Receivers § 5, p. 662-665; 1 High, Injunctions, sec. 7 and 8, p. 7-8.

Having determined that a receivership and a preliminary injunction are merely ancillary remedies which cannot stand alone as the full and ultimate relief afforded with respect to the matter in dispute, the question arises as to what should be done when these remedies

are pursued not as ancillary remedies but as the only relief sought. We think this question was properly answered long ago in the case of Patterson v. Miller, 57 N.C. (4 Jones' Equity) 451. In that case an interlocutory appeal was taken from the refusal of the lower court to dissolve an injunction. The North Carolina Supreme Court held that the injunction, not having been sought as ancillary to some full relief upon the merits of the dispute, had been improvidently granted and dissolved the injunction. The court stated:

> "The relief by injunction does not per se constitute an equity; except when it is to prevent torts, as to stay waste, destructive trespass, and the like; but is ancillary to some primary equity which the bill seeks to enforce; * * * It follows that to entitle a plaintiff to this ancillary relief, the bill must contain matter sufficient to make out some primary equity, in aid of which the injunction is asked for. * * *

What primary equity does the bill seek to establish? It lays the foundation for none. There is no averment of an offer to rescind the contract and reconvey, because of the defect in the title, or of a willingness on the part of the plaintiff to do so, and without it, the prayer for general relief is unmeaning. No further proceeding seems to be contemplated in this Court except the injunction; no other order is asked for; there is not even an intimation that the plaintiff wishes a reference in respect to the title, or a suggestion of what action is to be taken in regard to it, supposing the plaintiff is entitled to have such an order after the contract has been executed by his accepting a conveyance, and relying on the covenants of seizin and warranty. Nor is there an averment, that the plaintiff has instituted a suit at law, or intends to do so, upon the covenants of seizin, so as to try, in the courts of common law, the validity of the defendant's title. In short, without laying the foundation for any further action in this Court; and without proposing to proceed in any other court, the plaintiff, being in possession under a deed with full covenants, desires to hold the land without paying for it! and to enjoin the collection of the purchase-money, for an indefinite time, or until those claiming under one Cathcart, who are

> not parties to this proceeding, and over whom the Court has no control may see proper to institute an action of ejectment! It is not according to the course of this Court, to allow litigation to be commenced and left in a condition, indefinite, unfinished, and dependent upon the action of strangers." 57 N.C. at 453-454.

To the same effect is Washington v. Emery, 57 N.C. (4 Jones' Equity) 29.

In the instant case, plaintiffs brought a complaint for a temporary injunction and later made an oral motion for the appointment of a receiver. There was no averment that a further proceeding was pending or contemplated; and in fact, no further proceeding seems to be contemplated. Granite has been forced to turn over its records, its books, and its funds and to cease collecting rents on the property involved. Since 1972 the Federal Savings and Loan Insurance Corporation has managed the business of Granite as a court appointed receiver.

Plaintiffs, we presume, have been paid the regular installments pursuant to the contracts for deed. They need no further relief and do not appear ready to seek any. Regardless of whether plaintiffs should or should not ultimately prevail on the merits of this dispute, they should not be allowed to obtain full and ultimate relief by way of the ancillary remedies they have been afforded. We, therefore, have concluded that the temporary injunction and the receivership must be dissolved.

One further point need be considered, however. As we pointed out previously, the four years delay between the first setting for oral argument of this case and the oral argument, resulted from the stipulations of the parties that a settlement of the dispute was contemplated and imminent. In that respect defendants acquiesced in the con-

tinued receivership status. And not only did they acquiese in the continuation of the receivership, defendants agreed to the appointment of a receiver initially. At the hearing on April 26, 1972, counsel for defendants stated:

> "We also have no objection to the Court appointing the Federal Savings and Loan Insurance Corporation as a receiver, or any other party, or any other person who is not a party to this directly at this time as a receiver."

Therefore, although we have concluded that the temporary injunction and the receivership should be dissolved, we do not feel that defendants are entitled to have had the services of the receiver at no cost to defendants. Rather, the fees and expenses of the receivership property and the income derived therefrom; and we remand this cause to the circuit court to determine what amount should be properly assessed as expenses and

fees of the receivership.

Temporary injunction and receivership dissolved. Cause remanded with directions.

KARNS, P.J., and EBERSPACHER, J., concur.

SUPPLEMENTAL OPINION UPON DENIAL OF PETITIONS FOR REHEARING

In the opinion filed in this case we stated that we presumed that plaintiffs had been paid the regular installments pursuant to the contract for deed. Subsequent to the filing of the opinion each of the parties have filed a petition for rehearing. Plaintiffs point out in their petition, supported by affidavit, that they in fact have not been receiving payments pursuant to the contract and request an order of this court directing the receiver to apply accumulated moneys in its hands to payments to the

plaintiffs pursuant to the contract. Granite and Green in their petition for rehearing have asserted, supported by affidavit, that there are equities upon their part to be considered and that plaintiffs are accordingly not entitled in toto to the payments upon the contract which they seek from the receiver.

In view of the apparent factual dispute regarding plaintiffs' entitlement to payments on the contract it is necessary that the question be determined in the first instance by the trial court after pleadings and a hearing on the merits.

We accordingly correct our original opinion wherein it states that we presumed that plaintiffs have been paid the regular installments pursuant to the contract for deed. Such presumption was unwarranted.

Upon remand, the trial court should

call for pleadings upon the issue of plaintiffs' entitlement to receive from funds in the hands of the receiver the accrued, unpaid installments upon the contract for deed, and after a hearing, should determine the plaintiffs' entitlement upon the merits of the question. The direction to the trial court to conduct a hearing on the fees and expenses of the receivership, as provided in the original opinion, stands.

KARNS, P.J. and EBERSPACHER, J., concur.

APPENDIX E

PSL REALTY COMPANY, a corporation and Illini Federal Savings and Loan Association, a corporation of the United States of America,
Plaintiffs-Appellees,

v.

GRANITE INVESTMENT COMPANY, a Limited Partnership, James C. Green, an Individual, Darryl Layman, an Individual, and First National Bank in Madison, a corporation,
Defendants,

Granite Investment Company, a Limited Partnership, and James C. Green,
Defendants-Appellants.

No. 77-125.

Appellate Court of Illinois,
Fifth District

Sept. 13, 1979.

Supplemental Opinion Oct. 2, 1979.

JONES, Presiding Justice:

We consider this case on appeal a second time. On the first appeal (42 Ill.App.3d 697, 1 Ill.Dec. 417, 356 N.E. 2nd 605) we dissolved a preliminary injunction and a receivership for the reason that the plaintiffs in their com-

plaint had sought only ancillary and temporary relief; no attempt was made to obtain relief on the merits of any claimed cause of action. We remanded the cause for a hearing to determine the proper expenses of the receivership, and, after appropriate pleadings on the matter, for a determination of the plaintiffs entitlement to be paid accrued, unpaid installments upon the contracts for deed which gave rise to this lawsuit.

This second appeal considers the propriety of the action of the trial court in striking certain petitions filed by the defendants and the final order of April 29, 1977 discharging the receiver and denying other petitions filed by defendants.

Since our disposition of the first appeal was upon procedural grounds the facts attending this case were rather

sparsely stated. For disposition of this appeal a more complete statement of a complicated factual situation must be furnished.

Prior to August 1, 1970 the defendant, James Green, in conjunction with others, developed and constructed several apartment complexes in Madison, Clinton, St. Clair and Sangamon Counties, Illinois. To obtain funds for the projects first lien mortgages were executed in favor of Piasa Savings and Loan Association (Piasa). Financial difficulties were encountered in the completion and operation of the units and restructuring of the debt and provision of additional construction funds became necessary. To accomplish this the parties entered into a lengthy and detailed agreement, termed the base agreement, on August 1, 1970. Under its

terms title to the units was conveyed to a newly formed corporation named PSL Realty Co., wholly owned by Piasa Savings and Loan Association, and PSL Realty Co. (PSL) then entered into contracts for deed to the same properties with Granite Investment Company (Granite) a limited partnership of which James Green (Green) was the principal, to recovery when the provided payments were made and conditions fulfilled. Piasa Savings and Loan Association continued to hold the first lien mortgages as mortgagee.

By the terms of the base agreement all rental proceeds of the units were to be delivered to PSL by Granite, 20% of which were to be used for expenses of operating the properties, such as utilities, taxes, repairs, etc., and 80% of which were to be applied to debt service

on the mortgages. Financial matters apparently did not go well for either party. Assertedly Piasa was so adversely affected by the situation that in order to protect its depositors it was merged with Illini Savings and Loan Association (Illini) and ceased to exist as a separate operating entity. The merger was procured by the Federal Savings and Loan Insurance Corporation (FSLIC) to prevent losses to Piasa's depositors and avoid insurance payments to cover those losses. As part of the merger Illini became the owner of the mortgages, 48 in number, upon the apartment units and a residence of James Green. They also became the sole owner of PSL Realty Co. which, under the base agreement, was holder of legal title to the units, subject to the contracts for deed with Granite, and entitled to the

gross rentals from operation of the units.

Matters pertaining to the financial management and operations of the units reached a climax in March 1972. In later testimony Green admitted that the apartments were losing about $30,000 per month at the time. On March 27 PSL and Illini demanded the books and records from Granite, but they were refused. On April 11 PSL and Illini sought, and received, a temporary injunction, without notice but with a bond of $50,000 security waived. The injunction ordered Granite and Green to refrain from collecting rents and to not interfere with plaintiffs collecting rents. Granite and Green were also directed to turn over their books for examination. Notice of default and forfeiture of the contracts for deed between PSL and Granite were

served upon Granite's Attorney on April 20 and upon Green on April 21. On April 21 Granite and Green filed a motion to quash the temporary injunction and a counterclaim for an injunction against PSL and Illini that would prevent their interference with defendants' operations. Herings were held on April 21, 24 and 26. During the hearing on the 26th the plaintiffs made an oral motion for the appointment of a receiver for all the units. Green and Granite voiced no specific objection to the appointment of FSLIC. On April 28, 1972 the court entered an order denying the motion of Green and Granite to dissolve the temporary injunction and appointing FSLIC receiver. The April 28 order delineated the powers and duties of the receiver as follows:

"IT IS FURTHER ORDERED,

ADJUDGED AND DECREED that the Federal Savings and Loan Insurance Corporation be appointed Receiver herein, with the usual powers of Receiver in Chancery, without bond, to manage, lease, rent, pay all bills, collect rents, issues and profits from the premises, pay all wages due or to become due to employees, supervise, repair, rehabilitate, insure and to perform all duties of Receiver in connection with the real estate involved in this suit and described in the exhibits attached to the complaint herein, and to report to this Court by the 15th of each month commencing May 15, 1972, and each thirty (30) days thereafter the income received from said properties by it, and the expenditures made in connection with the management of said premises. Said Receiver is herewith authorized and empowered to designate as its local agent to act on its behalf, in connection with the foregoing, any person, firm or corporation, including any of the parties to this litigation."

Pursuant to the last sentence of the above FSLIC designated Illini as its

local agent in the management of the receivership properties. As agent it collected the rents, paid the expenses, selected managers, kept the books on the transactions, etc.

Green and Granite appealed the April 28, 1972 order and we reversed for the reasons already stated. In our original opinion we presumed that plaintiffs had been paid the installments on the contracts for deed which had come due while the case was pending settlement negotiations and appeal. We dissolved the temporary injunction and the receivership and remanded the cause for a hearing to determine the fees and expenses of the receiver.

Both plaintiffs and defendants filed petitions for rehearing. The plaintiffs pointed out that they had received no installment payments on the contracts

for deed and requested an order of this court directing the receiver to apply accumulated moneys in its hands to the contracts. Granite and Green asserted certain considerations due them and that as a result the plaintiffs were not entitled to have the accumulated moneys in the hands of the receiver applied to the contracts. After reconsideration we stated: "In view of the apparent factual dispute regarding plaintiffs' entitlement to payments on the contract it is necessary that the question be determined in the first instance by the trial court after pleadings and a hearing on the merits." We thereon directed that upon remand the trial court should call for pleadings upon the issue of plaintiffs' entitlement to receive from funds in the hands of the receiver the accrued, unpaid installments of the con-

tracts for deed, hold a hearing and render a decision upon the merits.

The original opinion of this court dissolving the injunction and receivership was filed July 23, 1976. On August 13, 1976 PSL and Illini filed their petition for rehearing. On August 18, 1976 FSLIC purchased the first lien mortgages on all units in the receivership for $10,673,000 from Illini. On August 26, 1976, without notice to the defendants, the trial court or this court, the receiver, FSLIC filed a mortgage foreclosure action in the Federal District Court for the Southern District of Illinois on all 48 mortgages purchased from Illini. The foreclosure complaint alleged that no payments on principal or interest had been made on the notes since March 31, 1972. On August 31, 1976 Granite and Green filed their

petition for rehearing in this court. The supplemental opinion upon rehearing was filed on September 23, 1976 and the mandate issued October 13, 1976.

On October 28, 1976 the receiver filed a petition in the trial court for an order directing it to file a final report and setting a hearing thereon. On November 1, 1976 Granite and Green filed a petition alleging that FSLIC had wilfully represented to the court that it was an impartial third party, neutral in all respects, and capable of administering the properties without favoritism and without self-interest or profit. It was further alleged that such representations were false in that FSLIC did in fact have a substantial self-interest in the properties, had contributed $6,000,000 to the plaintiffs and was contractually liable to contribute much more in

certain events directly related to the subject matter of the lawsuit. The petition further asserted that FSLIC was the instigator of the wrongful forfeitures of the contracts for deed by PSL, that it had the right to purchase assets of Piasa, predecessor of Illini, at book value; that FSLIC as receiver expended hundreds of thousands of dollars toward capital improvements of the properties, thus adding to their value, and expended hundreds of thousands of dollars in renovation, upgrading and maintenance of the properties, thus adding to their value, all of which funds were taken from rental receipts, and notwithstanding that it collected over $6,000,000 in rents it made no payments of principal or interest on the mortgages on the properties. The petition finally alleged that in breach of its fiduciary duty

it purchased the 48 mortgages on the properties of which it was receiver, without notice to or approval of the court, accelerated the payments due upon such mortgages, and, on August 26, 1976, without notice to or permission of the court, filed suit to foreclose all 48 mortgages, all contrary to its fiduciary duty to the parties and adverse to the specific rights of the petitioners. The petition concluded with a prayer that the receiver be ordered to immediately reassign the mortgages to Illini, account for all its expenditures, pay into the rental fund all money paid to officers and employees of Illini and PSL, pay any excess of money to Granite for use in paying its obligations, turn over all books and records and return physical possession and management of the properties to petitioners. Granite and Green also filed an objection to the petition

of FSLIC for authority to file a final report on the grounds that they had filed a petition for affirmative relief against the receiver and the case had not reached the stage for a final report.

FSLIC filed a response to the November 1, 1976 petition of Granite and Green in which they denied any wrongdoing in their actions as receiver. With regard to the allegations of wrongful purchase of the mortgages from Illini it asserted that the purchase was made, not as receiver, but in its capacity as an agency of the United States acting pursuant to the supervisory duties and powers granted it by federal law. It further asserted that at no time had the notes and mortgages been in the possession of the receiver since the receiver was appointed "to perform all duties of receiver in connection with the real estate involved in this

suit * * *." (Their emphasis.) As Count II FSLIC incorporated an affirmative response to the November 1, 1976 petition. In this FSLIC asserted that it did not seek the receivership and accepted the office only on condition that it be permitted to appoint Illini as its local agent. It made no representations regarding its qualifications to act and no questions were asked or objections raised although its supervisory interest underlying the subject litigation was well known. In its supervisory capacity, and pursuant to its statutory duties, it suggested and implemented the merger of Piasa into Illini and as an incident of such merger entered into a financial agreement designed to minimize the danger to Illini's stability caused by the absorption of Piasa'a assets and liabilities,

and no secret has ever been made of FSLIC's involvement. It further asserted that its supervisory interest did not in any way disqualify it from serving as receiver and section 10-1 of the Illinois Savings and Loan Act (Ill.Rev.Stat. 1975, ch. 32,par.921) specifically authorizes the appointment of FSLIC as receiver of closed associations. FSLIC finally asserted that it purchased the 48 mortgages for $10,673,000 under the terms of its financial assistance agreement with Illini which gave it the right to purchase at book value any asset of Piasa held by Illini which had not been liquidated. FSLIC purchased the mortgages and filed the foreclosure after the appellate court ruled that the receivership had to be dissolved and that these actions were not taken as receiver but as an agency of the United States acting

in accordance with its functions under federal law.

On December 22, 1976, acting on its own motion, the court struck the Granite and Green petition of November 1, 1976 and the response of FSLIC thereto for the reason that neither of the pleadings were responsive to the mandate of the appellate court. The order called for the final report of the receiver to be filed by February 10, 1977 and any objections thereto by February 25, 1977.

On January 3, 1977 Granite filed a petition charging plaintiffs with wrongful dispossession from the premises and wrongful procurement of a receiver, they asserted that plaintiffs had paid themselves and their agents large fees for management and prayed that the court order the receiver to pay petitioner a reasonable sum for loss of profits they

would have derived from management. On the same day Green filed a petition for accounting in which he alleged he was the owner of laundry equipment in the Spencer Gardens apartment unit, that the plaintiffs and the receiver utilized such equipment in their operations, thereby converting them to their own uses. The petition further alleged that Green was the owner of all stoves, refrigerators and miscellaneous appliances in all units in the receivership and that the plaintiffs have refused to account for the profits therefrom. The petition prayed that the plaintiffs be ordered to account for all monies received from the laundromat and for all profits from rental of the appliances. Also filed on January 3, 1977 was a Motion in Aid of Appellate Court Mandate by Granite in which it was alleged that the plaintiffs

and the receiver have refused to restore petitioners to the status quo that existed at the time the temporary injunction was issued by returning possession of the units to petitioner. The prayer of the motion was for an order of court placing Granite in possession of the units.

The final report of the receiver was filed on February 9, 1977. It recited that FSLIC had served for 54 months and had filed with the court monthly reports of all monies collected and expended. Attached to the report was a consolidated statement which reflected income from rentals and expenditures for various categories such as taxes, utilities, management fees, legal fees, etc., all items being related to the several different rental units comprising the receivership property. The summary showed

gross rentals of $5,734,933.89 and expenses of $4,149,835.79 and an undisbursed balance of $2,158,313. The excess over the arithmetical balance was interest earned on the receiver's account and certain adjustments. The final report concluded with a prayer for an award of fees to be paid from the balance on hand and the discharge of the receiver effective September 30, 1976.

On February 25, 1977 FSLIC filed a response to the Green petition of January 3, 1977 in which it denied his assertions regarding ownership of the laundry facilities at Spencer Gardens unit and the refrigerators, stoves and appliances at all units and alleged them to be attached to and part of the real estate. The response also alleged that the matters asserted in the Green peti-

tion were a duplication of a prior suit pending in the circuit court of St. Clair County, No. 73 L 1676 and the petition should accordingly be dismissed pursuant to section 48(c) of the Civil Practice Act (Ill.Rev.Stat. 1975, ch. 110, par.48(c)).

Also on February 25, 1977 FSLIC filed a response to the Granite petition of January 3, 1977. It denied paying management fees to Illini or PSL and admitted paying monthly fees to resident unit managers. It further denies that Granite has been deprived of any profits since Granite had admitted to losing $30,000 per month by its management of the properties prior to appointment of the receiver. It concluded by stating that no management services were provided by Granite since the appointment of the receiver and therefore they were not entitled to fees.

FSLIC filed on February 25, 1977 its motion to strike Granite's Motion for an Order in Aid of Appellate Court Mandate on the grounds that only the appellate court could render such an order, the motion was premature, and, in any event, FSLIC obtained possession of the units from PSL, not Granite, a fact it asserted was admitted by Granite in its petition and in two complaints filed in St. Clair County Circuit Court, Case Nos. 73 L 1674 and 73 L 1677.

On February 25, 1977 the plaintiffs filed a response to the receiver's final report coupled with a petition for distribution of undistributed receipts. By this pleading the plaintiffs called upon the court to approve the final report of the receiver and order the undistributed balance of $2,158,313 applied to payment of past due mortgage payments which then

aggregated $3,996.417.96.

The final filing on February 25, 1977 was plaintiffs' response to the January 3, 1977 petitions of Green and Granite and the Motion in Aid of Appellate Court Mandate of Granite. They moved to strike, pursuant to sections 45 and 48 of the Civil Practice Act (Ill. Rev.Stat.1975, ch. 110, pars. 45 and 48), all three pleadings upon the grounds that they raised issues that were outside the scope of the appellate court mandate and that the same issues were previously raised in suits previously filed in the circuit court of St. Clair County entitled Granite Investment Company v. PSL Realty, et al., No. 73 L 1677 and Granite Investment Company and James C. Green v. PSL Realty Co., No. 73 L 1676.

On February 28, 1977 the defendants filed a motion to strike and objections

to the receiver's final report. The objections were that approval of the final report would be tantamount to approving all of the actions of the receiver from April 28, 1972 to the present, thus immunizing the receiver from any subsequent action for wrongdoing despite the fact that defendants' petition of November 1, 1976 alleged misfeasance on the part of the receiver in that it had acted contrary to duties imposed by law. They further objected that their two petitions and motion filed January 3, 1977 were still pending and until they have been determined the court should not accept a final report.

A hearing was held on March 31 and April 4, 1977 on the final report of the receiver and all other pending pleadings filed on January 3, 1977 and subsequent

thereto. The receiver, the plaintiffs and the defendants were present, presented evidence and made closing arguments. Findings of court were made and filed on April 13, 1977, the substance of which is as follows:

> The Court is limited by the mandate of the appellate court which read:
>
> > "Upon remand, the trial court should call for pleadings upon the issue of plaintiff's entitlement to receive from funds in the hands of the receiver the accrued, unpaid installments upon the contract for deed, and after a hearing, should determine the plaintiffs' entitlement upon the merits of the question. The direction to the trial court to conduct a hearing on the fees and expenses of the receivership, as provided in the original opinion, stands."

No monies are due Granite as prayed in its petition for reasonable profit, the petition of James Green for accounting for use of laundromat facilities is

stricken for the reason that there is a companion case pending in St. Clair County Circuit Court and the matter is outside the purview of this court;

The Motion in Aid of the Appellate Court Mandate filed by Granite is outside the jurisdiction of the court and outside the purview of these proceedings;

The final report filed by the receiver represents a consolidation of the 54 monthly reports of the income and expenses of the receivership which have herto been submitted to and accepted by this court;

The receiver discharged its fiduciary responsibility in a prudent, business-like and non-prejudicial manner having sought and received court approval for extraordinary expenditures and other activities; and Granite offered no evidence challenging the need for or

appropriateness of any expenditures made by the receiver;

The order appointing the receiver did not authorize it to make any payment on the outstanding indebtedness and at no time during the original appeal of the case did any party make such a request that the income from the properties be disbursed in a manner other than as provided in the order of the circuit court of April 28, 1972;

The final report should be approved and all undistributed funds paid to FSLIC in its capacity as mortgagee, for application on mortgages encumbering the properties, from which funds were derived, together with a pro rata application of interest monies to each property on the ration of income generated by each individual property to the aggregate income generated by all of the pro-

perties, subject to a receiver's fee, which the court fixed in the sum of 4% of the income received by it;

The appellate court in the original appeal determined that the original proceedings herein were ancillary remedies only and in the absence of a substantive action, could not stand alone and should be dissolved. Defendants apparently recognized and pursued other substantive relief in three separate legal actions filed in the St. Clair County court for damages by reason of contract forfeiture, wrongful possession of laundromat facilities, alleged breach of contract, misapplication of rental incomes and specific performance;

Since the decision of the appellate court this court has been advised, and pleadings disclose, that foreclosure proceedings have been filed upon properties presently the subject matter of

this receivership and said properties are now possessed by FSLIC, as mortgagee in the Federal Court, Southern District, Illinois;

Considerable legal services were rendered to the receiver in this cause by its attorneys and the receiver has not sought any compensation therefor.

The foregoing findings produced an order which was entered by the court on April 29, 1977, the pertinent portions of which:

(1) Approved and adopted the final report of the receiver, including all actions taken by the receiver and its managing agent.

(2) Awarded the receiver a fee of 4% of the gross receipts generated by the receivership and directed payment from the undistributed proceeds available for distribution.

(3) Directed the balance of the undistributed funds be paid to the mortgagee for application to the indebtedness encumbering the property, said application to be made to the paroperty from which the funds were derived. After payment of the fee and application to each mortgage any remaining portion of interest earned on the receivership account was to be applied on a pro rata basis to the properties. The pro rata application to each property was to be the ratio of income generated by each individual property to the aggregate income generated by all the properties.

(4) Granite's motion to strike and objections to the receiver's final report, the petition, petition for accounting, and Motion in Aid of Appellate Court Mandate were denied.

(5) The receiver and its agents

were fully discharged and released effective September 30, 1976.

(6) The order was declared final and a finding made that there was no just reason for delaying enforcement of or appeal therefrom.

Defendants filed a notice of appeal from the order of court entered December 22, 1976 striking the defendants' petition of November 1, 1976, and a notice of appeal from the order of court entered April 29, 1977. The two appeals are consolidated for opinion.

As may be seen from a review of the pleadings described above many issues and arguments were advanced to the trial court and they are renewed here. However, the scope of the issues to be considered is strictly controlled by the nature of the proceeding. The only concern we have is with the windup of the

receivership following the dissolution of the temporary injunction and the receivership. Only issues necessarily related to that process may be considered. We may not be concerned with the ultimate rights of the parties with regard to the merits of the substantive claims made. The absence of substantive claims from the case caused the dissolution of the temporary injunction and the receivership. No hearing has ever been held concerning substantive claims and we would refrain from making any remark that would indicate an opinion regarding any substantive rights of the parties.

However, the contricted area of concern cannot be so narrow as to preclude consideration of any and all matters reasonably and properly pertaining to the closing out of the receivership. Accordingly, we deem it proper to review

claims of misfeasance and malfeasance by the receiver throughout the term of its office. Such actions are naturally brought into the focus of concern at the time of hearing on the final report. The defendants must at some time have an opportunity to be heard in court regarding their charges against the receiver in the management of the properties. They likewise must be afforded opportunity to make a full inquiry into the accounting given by the receiver. It is to be noted that FSLIC was not acting as receiver in this case pursuant to any federal statute or because of any duty arising out of its supervision of savings and loan associations or because of any duty owed to the public as provided in a federal statute. For the purposes of this case it must be regarded the same as any other receiver, personal or corporate.

Although there are three other actions pending in the circuit court of St. Clair County wherein defendants Granite and Green are plaintiffs, and the relief sought in those cases involves the same property as the receivership, none of those cases either names FSLIC as a party defendant nor seeks affirmative relief against it. This is the only action where defendants can question the conduct of the receiver; by failing to do so they would very likely be confronted with claims of res judicata, collateral estoppel or waiver in any future action.

The foregoing generalized discussion of the permissible scope of review must now yield to the particular. The trial court and the parties were proscribed in their actions by the mandate of this court following our opinion in the first appeal. After a judgment is reversed by

an appellate court, the appellate court judgment is final upon all questions decided and those questions are no longer open to consideration, and the court to which the cause is remanded can take only such proceedings as conform to the judgment of the appellate tribunal. Berry v. Lewis (1963), 27 Ill.2d 61, 187 N.E.2d 688; Thomas v. Durchslag (1951), 410 Ill. 363, 102 N.E.2d 114; People v. Bain (1973), 10 Ill.App.3d 363, 293 N.E.2d 758.

The mandate directed the trial court to call for pleadings upon the issue of plaintiffs' entitlement to receive from funds in the hands of the receiver the accrued, unpaid installments upon the contract for deed, and after a hearing, decide the question on the merits. The mandate also directed the court to conduct a hearing on the amount to be allow-

ed as expenses and fees of the receivership.

What issues, then, may properly be encompassed within the plaintiffs' entitlement to payment on its contracts for deed with Granite and the receiver's entitlement to expenses and fees for its services? And, under the posture of the case before the trial court, were there other matters or issues that were undetermined in the first appeal or arose following the first appeal over which the trial court retained jurisdiction? These questions control the determination of the case.

Twenty-one days after the filing of the original opinion by this court, FSLIC, the still acting receiver, purchased 48 mortgages from Illini. All the property of the receivership was covered by these mortgages. Eight days later the receiv-

er filed suit in Federal District Court ti foreclose on these mortgages. FSLIC did not seek permission of the trial court or the appellate court, or even notify them of its actions regarding the purchase and foreclosure.

On October 28, 1976 the receiver filed a petition for leave to file its final report.

Neither the action by the receiver in purchasing the mortgages and instituting foreclosure thereon, nor the filing of a final report by the receiver were directly addressed by this court in its opinion on the first appeal or in its mandate. Nevertheless it cannot be argued that the trial court was without jurisdiction to consider any issues these actions presented. The basis for jurisdiction to consider issues arising from the purchase and foreclosure of the

mortgages arises because the transactions occurres following the first appeal and the basis for jurisdiction of matters arising from the filing of a final report is present because it is a necessary concomitant of the windup of a receivership.

> "If a cause is remanded the court to which it is remanded can take only such proceedings as conform to the judgment of the appellate tribunal, and if specific directions are given the court can do nothing but carry out such directions, but if directions are not given it must be determined from the nature of the case what further proceedings would be proper and not inconsistent with the opinion." Town of Kaneville v. Meredith (1935), 361 Ill. 556, 198 N.E. 857.
>
> See also People ex rel. Shake v. Lord (1925), 315 Ill. 603, 146 N.E. 506.

Following the receiver's petition for leave to file its final report Granite and Green filed their petition

of November 1, 1976, alluded to above, in which they attacked the purchase and foreclosure of the mortgages and the expenditure by the receiver of hundreds of thousands of dollars for capital improvements on the apartment units and the expenditure of hundreds of thousands of dollars on the renovation of the apartment units, and asked for an order restoring possession to petitioners. We think this petition tendered issues which the court had jurisdiction to consider although they were not specifically mentioned in the mandate. Those issues were the action of the court's receiver in purchasing and commencing foreclosure of mortgages upon the receivership property and the expenditure of funds for capital improvements and renovation. FSLIC filed its response to the November 1 petition traversing its allegations

and alleging affirmative matters in justification of the purchase and foreclosure of the mortgages. On its own motion the court struck both these as being outside the powers conferred by the mandate. For the reasons assigned, we believe this was error.

Before dealing with the issues presented by the November 1, 1976 petition we will advert to the two petitions and the motion filed by defendants on January 3, 1977. The prayers of all three of these pleadings were denied by the court in its order of April 29, 1977 after a finding that all were outside the scope of the mandate. The first of these pleadings was the petition of Granite for loss of profits for wrongful dispossession. It is closely related to the third pleading which was Granite's Motion in Aid of Appellate Court Mandate whereby Granite sought an order restor-

ing it to possession of the units. We agree with the trial court that both these pleadings raise issues that were outside the scope of the mandate. Moreover, there was no residual jurisdiction of matters not covered by the mandate but in issue that would enable the court to consider the pleadings. The issue of precisely when dispossession occurred, or who procured it, is not and never was in issue in this case and has no relevance to the closing out of the receivership. Accordingly, it would be improper to address the issues of damages for wrongful dispossession and the restoration of possession in this case.

The second petition of November 1 was that of Green in which he sought an accounting for income from laundry equipment and appliances allegedly belonging to him and used by the receiver in the

operation of the units. Whether the laundry equipment and appliances were part of the real estate or not is of no consequence to the receiver after dissolution is ordered. The laundry equipment and appliances were in place when the receiver assumed office and no distinction was made at any time in the mode of handling those items. The question of ownership and use of the items involved lies between Green, Granite and the plaintiffs. The receiver can neither help nor hinder in the resolution of the ownership question. It appears that all the bookkeeping on the receivership was done by Illini and those records will remain available to the parties whenever the ownership issue is tried. We accordingly agree with the trial court that the issue of the ownership of the laundry equipment and appli-

ances, and any profits derived from their use, is outside the scope of issues that may be considered in closing out the receivership.

Following the filing of the final report and petition for discharge the defendants filed their motion to strike and objections. In their objections the defendants expressly adopted and incorporated the assertions and objections contained in their November 1, 1976 petition. No motion to strike or other responsive pleading was ever filed by the plaintiffs or the receiver. Thus, the issues regarding the propriety of the receiver spending hundreds of thousands of dollars for capital improvements to the units, spending hundreds of thousands of dollars for renovation of the units, and the propriety of the receiver purchasing the mortgages covering the units were once again before the

court. We have already stated that the court was clothed with jurisdiction to hear and consider these matters and the pleadings placed the issues thereon once again before the court. Moreover, the parties presented a substantial quantity of evidence to the court touching these matters and strenuously advanced their respective positions. Presentation of these issues was continued in this court by the parties in both the briefs and the orgl argument. In this posture of the case the parties must also be deemed to have formed the issues at trial, even absent formal pleadings (Slezak v. Fleming (1946), 392 Ill. 397, 64 N.E.2d 734; Buzan v. Buzan (1977), 45 Ill.App. 3d 181, 4 Ill.Dec. 1, 359 N.E.2d 834), and there can be no question that the issues were before the court and were litigated by the parties.

At the hearing evidence was given on behalf of the receiver regarding the unfinished and generally decrepit condition of many of the units and of the propriety and economic feasibility of doing the necessary work to finish and restore them. Vigorous cross-examination was made by defendants' attorney. Green testified in defendants' behalf and set forth their position and views. Admittedly, much remained to be done to bring all the units to a state of completion. We think it is fair to say that as a result of the capital expenditures by the receiver new apartments were made available for renting and many needed repairs and improvements were made to existing apartments. There can be no question but that the receiver brought about a general improvement and upgrading of the units.

What, then, of the expenditure of hundreds of thousands of dollars from receivership funds for capital improvements and renovation? We believe the court's findings in this regard, implicit in its approval of the receiver's final report, to be fully supported by the evidence. There was little, if any, evidence that the improvements were unneeded, and no evidence that any expenditure of receivership funds was made on anything other than the property of the receivership, save, of course, the fees for resident managers and attorneys.

Aside from the question of the weight of the evidence regarding the improvements and renovation we find that defendants have waived their right to object to expenditures for these items at the hearing on the final report. In each instance of expenditure of receiver-

ship funds for capital improvements or renovation the receiver filed a petition with the court which detailed the proposed expenditure and the means and method of making it. Defendants were notified of the filing of each of the petitions by receiving a copy thereof. They were also notified of the time of hearing on each petition. The defendants chose not to appeal to dispute any of the petitions. Hearings were held in each case and orders of court entered authorizing the expenditure to be made. The record contains several such petitions and the proceedings and orders thereon but it would only add undue length to this opinion to detail them. Since defendants stood by and suffered orders to be entered by the court without objectins thereto they waived their right to object at the

hearing on the final report. The improvements did, after all, go exclusively into the receivership property and defendants are the owners of the equitable title therto. It was their property that received the benefits of the improvements. Furthermore, the receiver was in these matters but acting for the court whose orders directed the expenditures. As stated in the case of Reardon v. Youngquist (1915), 189 Ill. App. 3, 12, 13:

> "Regardless of the matter of consent, we consider the contention of appellees that a receiver in obeying the orders of the court must, in effect, become a guarantor of the correctness of the court's rulings and be personally responsible for any error the court makes in directing how he shall distribute the money that comes into his hands, as unsound.
>
> A receiver is an officer of the court and subject to its orders. The real custody of the property in his hands

is in the court, of which he is an officer. Coates v. Cunningham, 80 Ill. 467. As such officer, he has no discretion or personal control over the property in his hands. Fields v. United States, 27 App.Cas.D.C., 433. He must obey the orders of the court so long as they are unimpeached. People v. United States Mut. Acc. Ass'n., 88 App.Div.(N.Y.) 597 [85 N.Y.S. 137).* * Obedience to such orders is his sufficient protection. How & Co. v. Jones, 60 Iowa, 70; In re Home Provident Safety Fund Ass'n., 129 N.Y. 288 [29 N.E. 323]; Id., 60 Hun 584 [15 N.Y.S. 211]; Willis v. Sharp, 124 N.Y. 306 [26 N.E. 974]; Pfeffer v. Kling, 58 App.Div. 179 [68 N.Y.S. 641], affirmed in 171 N.Y. 668 [64 N.E. 1125]; Pierce v. Lees, 17 App.Div. 346 [45 N.Y.S. 294]; State v. Port Royal & A. Ry. Co., 45 S.C. 464 [23 S.E. 380]. And this is true even if the order is erroneous and is subsequently reversed. Plat v. New York & S. B. Ry. Co., 170 N.Y. 451 [63 N.E. 532]; Coe v. Patterson, 122 App. Div. 76 [106 N.Y.S. 659], and 123 App.Div. 914 [108 N.Y.S. 1127]; Lesster v. Lawyers' Surety Co., 50 App.Div. 181 [63 N.Y.S. 804].

> Having had notice of the various petitions of the receiver for direction and authority to pay the various items now objected to, they are chargeable with notice of the orders entered. It was clearly the duty of appellees, if they desired to oppose the payment of those various items by the receiver out of the funds in his hands, to have opposed the entry of the order by showing to the court why it should not or could not legally be entered, or at least to have sought its vacation on motion and a showing. Failing in this they have notified the receiver that they would hold him responsible for a misapplication of the funds, if he obeyed the order. Having done none of these things, but on the contrary having acquiesced in what was done by absolute silence, even if not by actual consent, their conduct savors of an attempt to entrap the receiver and should be and in our judgment is enough to estop them from now complaining. We think the receiver should have credit for all moneys paid out by him in pursuance to the orders of the court above referred to."

See 76 C.J.S. Receivers § 374 b. It is also to be specifically noted that the

expenditures discussed here were made before the receiver purchased the mortgages. Whether the expenditures were made by the receiver in contemplation of later acquisition by purchase and foreclosure of the mortgages is immaterial, as will later appear.

The mandate of this court directed the trial court to consider the issue of plaintiff's entitlement to receive the excess funds in the hands of the receiver as payments upon the contracts for deed with Granite. We think the court properly discharged this duty when it found the mortgages held by Illini, subsequently acquired by the receiver, to have a prior claim to these moneys and directed the receiver to apply them upon those mortgages.

We also sustain the trial court's approval of the balance of the receiver's

final report insofar as it is concerned with the ordinary expenses of operation of the units, such as for utilities, taxes, monthly fees for the resident managers and the like. There is no showing of waste or mismanagement and monthly reports of all receipts and expenditures were filed with and approved by the court. For all that appears these items were substantially the same as would have been incurred by any other operators of similar properties. In this regard the court's findings are supported by the evidence.

We finally come to those issues raised by the receiver's purchase of the mortgages on the receivership property. Judicial restraint is required for the situation could justify some caustic comment.

While receiver of the extensive properties involved in this case the receiv-

er purchased mortgages on the properties and filed suit to foreclose them. This at a time when the receiver was the legal custodian of the property for the court. A receiver is an officer of the court and his possession is the possession of the court. (People ex rel. Scott v. Pintozzi (1972), 50 Ill.2d 115, 277 N.E.2d 844; Anderson v. Macek (1932), 350 Ill. 135, 182 N.E. 745.) There was no notice. There was no seeking of permission of court. There was no expression of intention. This surreptitious acquisition occurred after the opinion of this court ordered the injunction and receivership dissolved but before the receiver's final report had been filed. In fact, the discharge of the receiver is still not final and FSLIC remains even now an officer of, and an arm of, the court. The action of the receiver in

purchasing and foreclosing of the mortgages would completely frustrate the jurisdiction and orders of the very court whose will it serves.

Such practice simply cannot be countenanced. So holds all the authorities on the subject and so hold we. Much, much more is expected of receivers than the conduct we see here. Complete loyalty is a fundamental duty of a receiver and nothing less than that is acceptable. It is appropriate here to use the often quoted expression of Justice Cardozo in Meinhard v. Salmon (1929), 249 N.Y. 458, 464, 164 N.E. 545, 546:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the

> most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Professor Bogert, in his work on Trusts and Trustees, sec. 543, states:

> "In its desire to guard the highly valuable fiduciary relationships against improper administration, equity deems it better to forbid disloyalty and strike down all disloyal acts, rather than to attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests."

The credo for fiduciaries penned by Justice Cardozo has been adopted and consistently followed by Illinois courts. For example we cite from Ravlin v. C., A. & De K. R. R. Co. (1921), 297 Ill.

130, 144, 129 N.E. 730, 736:

> "When a person accepts an appointment as receiver he must not permit his personal interests to in anywise conflict with his duty in that respect. It is well settled that a receiver can make no profit out of his trust other than the compensation which the court may allow him under the law. He cannot deal with the property involved for himself while he is receiver, and if he does, the benefit must inure to the trust estate. It makes no difference if the company for which he is receiver was not a loser in the transaction, nor however free from fraud the transaction may be. Hooper v. Winston, 24 Ill. 354; Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157, 124 N.E. 449; Magruder v. Drury, 235 U.S. 106, 35 S.Ct. 77, 59 L.Ed. 151; 34 Cyc. 254, 255; 23 R.C.L. secs. 83, 84."

The Supreme Court has also spoken on the conduct we consider here. In Crites v. Prudential Ins. Co. of America (1944), 322 U.S. 408, 64 S.Ct. 1075, 1077, 88 L.Ed. 1356, one Simkins had been appoint-

ed by a court as receiver of farmlands "to collect the rents and proceeds of the real estate * * to operate and manage, etc." During the course of the receivership, and while a foreclosure sale was pending, Simkins served as intermediary between the mortgagee and the buyer but forestalled the transaction until the foreclosure sale was complete. He then had the transaction completed at a great profit to the mortgagee who was also the sole bidder and purchaser at the sale. Simkins at no time disclosed to the court the existence of the prospective buyer or the amount of the offer made. The case arise when the petitioner, incorporated creditors of the mortgagors, sought to surcharge receiver Simkins for the payments he had received from the purchasers for procuring the sale to them. The court com-

mented as follows on the duties of a receiver:

> "It is obvious, moreover, that Simkins was bound to perform his delegated duties with the high degree of care demanded of a trustee or other similar fiduciary. He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself or his associates. Any profits that might have resulted from a breach of these high standards, including the profits of others who knowingly joined him in pursuing an illegal court of action, would have to be disgorged and applied to the estate. (Citations.)
>
> But Simkin's conduct is not to be measured solely by the arbitrary dichotomy of functions relating to the conservation and liquidation of the farm properties. As a co-receiver in charge of collecting the rents and operating the farms, Simkins was also an officer or arm of the court. He was appointed to assist the court in protecting the preserving, for the benefit of all parties concerned, the properties in the court's custody pending the foreclosure

proceedings. (Citations.) The court's authority and duties, however, covered all phases of the foreclosure proceedings. They included not only the conservation but the liquidation of the farm properties. The court had discretion to delegate these duties as it saw fit. But whatever the functional distribution, all the court officers were bound to act fairly and openly with respect to every aspect of the proceedings before the court. The mere fact that any one aspect did not fall within the delegated function of a particular court officer did not give that officer free rein to act in a secret, non-judicial manner as to that aspect. The court, as well as all the interested parties, had the right to expect that its officers would not make undisclosed private agreements, fail to reveal any pertinent information or use their official position for their own profit or to further the interests of themselves or any associates.

It is impossible to reconcile the activities of Simkins relating to the foreclosure sales with the basic standard of conduct demanded of him as an officer of the

court." 64 S.Ct. at 1079.

Also see Jackson v. Smith, 254 U.S. 586, 41 S.Ct. 200, 65 L.Ed. 418.

The Supreme Court termed the actions of the receiver in Crites as "reprehensible" and the term is equally applicable here.

FSLIC argues strenuously and at length in an attempt to justify its actions in purchasing and foreclosing on the mortgages. It asserts that it did not purchase the property it controlled as receiver, that property was the tangible real estate, it bought something else, it bought the mortgages which were no part of the receivership property. In its brief it states that in order for the receiver to breach its fiduciary duty it must be shown that it somehow dealt with receivership property. It then reasoned that the lien was ob-

tained not by the receiver but by Piasa. When the receiver later purchased the mortgage interest from Illini pursuant to a contract which antedated the receivership, the receiver did not obtain a lien against receivership property. Instead it purchased a "mere right to foreclosure an existing lien."

This argument is specious. The mortgagee can control the property, as indeed they are seeking to do. They assert the right to possession by virtue of an order of the District Court entered in the foreclosure proceeding. This is in direct conflict with its possession as receiver in this case, an office from which it is not yet discharged.

Applicable in this situation is the following from Restatement of the Law, Restitution, section 196:

"Section 196.

Where a fiduciary in violation of his duty to the beneficary purchases or retains an encumbrance upon property entrusted to him as fiduciary, he holds the encumbrance upon a constructive trust for the beneficiary.

Comment:

a. The rule stated in this Section, like the rule stated in Section 195, deals with a situation where the fiduciary is not acquiring property entrusted to him in which the beneficiary has a pre-existing interest, or property which he is under a duty to purchase or has undertaken to purchase for the beneficiary, but where the beneficiary has an interest in the subject matter and the fiduciary acquires for himself individually a different interest in the same subject matter.

b. Where the rule applies. The rule stated in this Section is applicable not only where it is the duty of the fiduciary to purchase the encumbrance for the beneficiary (see Section 194(1)), but also where he is under no such duty."

FSLIC addresses a further argument to sustain its actions in purchasing

the mortgages. It urges that it may serve a dual capacity and pursue dual aims in furtherance of the duties it performs. It asserts that as receiver of the circuit court it has managed the properties in accordance with law and the orders of the court and has rendered a strict account of its actions in that regard. On the other hand, it is an agency of the United States government and as such has statutory duties to perform as a supervisory agency for savings and loan associations. In this latter capacity it has the power, both statutory and contractual (with Illini, executed in pursuance of the merger arranged between Piasa and Illini) to purchase and foreclose the mortgages on the receivership property. It reasons that since it was acting in this latter capacity in purchasing and foreclosing

the mortgages that it was outside the scope and reach of the circuit court and its action should not, or even cannot, be challenged.

Unmistakenly we discern in this presentation of FSLIC a scarcely veiled suggestion that as an agency of the United States government its actions as well as its motives should go unquestioned for it is, after all, going about doing the public good.

This argument cannot elevate its breach of trust, faith and legal duty to the level even of barely acceptable conduct. Duality of position is never acceptable as an explanation for self-dealing with the property of another by a fiduciary. This the FSLIC well knew when it agreed to accept appointment as receiver. Having accepted the appointment as receiver its singular duty

attached and that singular duty cannot be avoided by the ploy that it was "acting in another capacity." There can be no other capacity. Accordingly, FSLIC has waived the right to claim, and is estopped to assert, that in purchasing and foreclosing the mortgages in question it was acting in a supervisory capacity of savings and loan associations under a federal statute.

In sum, the claim of FSLIC that it was empowered to act in some capacity other than as receiver cannot be asserted in this case. Accordingly, the trial court should have ordered FSLIC, its receiver, to reconvey to Illini all 48 of the mortgages it purchased, thus returning to the court the property it took from it.

For its misconduct and indiscretions incompatible with its position as an

officer of the court, all fees and compensation should be denied FSLIC. Crites v. Prudential Ins. Co. of America.

For the foregoing reasons we affirm the order of the trial court entered on April 29, 1977 except that portion discharging the receiver. This cause is remanded to the trial court with directions to enter an order that FSLIC, as receiver, reconvey the 48 mortgages in question to Illini before it can be discharged as receiver and that FSLIC shall receive no fees or compensation for its services as receiver. Fees and compensation previously allowed will be directed to be returned to the receiver's account and paid with the previous balance toward satisfaction of the mortgages.

Affirmed in part, reversed in part, and remanded.

KUNCE and KASSERMAN, JJ., concur.

SUPPLEMENTAL OPINION*

This supplemental opinion is necessitated because the receiver, FSLIC is now proceeding in the United States District Court, Central District, Springfield, Illinois, formerly the Southern District at the time the foreclosure proceedings were instituted, to foreclose the very mortgages which we ordered reassigned in our opinion filed September 13, 1979.

It cannot be denied that the federal court has jurisdiction of the parties and subject matter in its cause No. A-Civ. 76-79 nor that it has full power and jurisdiction to proceed therein. We do not seek to control the exercise of

*The panel for the supplemental opinion was Presiding Judge Jones, Judge Karns and Judge Kasserman.

jurisdiction by the federal court in any way whatsoever; we do not because we recognize that we cannot.

As for our part, we are now concerned with but a small residue of the case that was, and is, pending before us. By our opinion in this case, filed September 13, 1979, we have addressed and decided the merits of the issues that were presented to us. We are now only concerned with the discharge of the receiver. We are not dealing with a party to the action, we are dealing with the receiver in the case, an arm of the court itself.

We would specifically point out that at the time the receiver purchased the notes and mortgages and filed the foreclosure action the receivership had not been dissolved. Our original opinion in this case which called for dissolution

of the injunction and receivership was filed on July 23, 1976 and a supplemental opinion was filed on September 23, 1976. However, the opinion did not become operative, that is, the receivership was not actually dissolved, until the mandate was issued on October 13, 1976. Our receiver had purchased the 48 mortgages on August 13, 1976 and filed the foreclosure action on August 18, 1976, two months prior to the time the receivership was dissolved. At the time of the purchase and commencement of the foreclosure action this court had full jurisdiction of the entirety of the action, part, parcel, parties and receiver. FSLIC should not be heard to say in any court that at the time it acquired 48 mortgages the receivership had been dissolved. It is true enough that the receivership has now been dissolved

but also true is the fact that our receiver has not been discharged.

An aspect of this cause was heard by a single judge of this court upon an emergency basis on September 25, 1979, such hearing being held in response to a "Motion for Order" filed by the defendants on September 25, 1979. All parties and the receiver were present by counsel. Following the September 26, 1979 hearing an Order for Stay was entered. At the request of the receiver and the plaintiffs a reconsideration hearing on the September 26, 1979 Order for Stay was granted before a full panel of the court and held on September 28, 1979. Again, all parties were present by counsel.

Upon reconsideration by the full panel it has been concluded that the Order for Stay entered on September 26, 1979 should stand, and furthermore that

it should be incorporated in and made a part of this supplemental opinion. We have further concluded that the mandate of this court should issue instanter.

The September 26, 1979 Order for Stay, which is incorporated in this supplemental opinion, is as follows:

"ORDER FOR STAY"

This cause heard before the Appellate Court for the Fifth District of the State of Illinois upon the motion for order filed by Defendants, Granite Investment Company and James C. Green on September 25, 1979. Hearing on the motion was set for September 26, 1979 at 11:00 A.M. and notice ordered given.

The Court finds that notice of the hearing was given by the attorney for defendants by hand delivery or telephone.

Present at the hearing were Rex Carr,

for the defendants, Robert Patterson for the receiver, FSLIC and W. Stanley Walch for plaintiffs Illini Federal Savings and Loan Association and PSL Realty Co.

The attorney for the defendants advised the court in both the present motion and by oral argument that the court receiver, FSLIC, threatens to thwart the decision of this Court contained in its opinion filed on September 13, 1979, although the mandate of this Court has not yet issued, by proceeding with the mortgage foreclosure case in the Federal District Court for the Southern District of Illinois, Southern Division. In the oral argument the attorneys for the receiver, FSLIC, and the plaintiff acknowledged that they were, either separately or in conjunction with each other, indeed proceeding with the action for foreclosure on the forty-eight mort-

gages in issue in this case and furthermore it was stated that the case is set for hearing before the Federal Court on September 27, 1979.

In presenting oral argument before the Court on the hearing of the instant motion the parties sought to inject issues beyond the scope of the appeal considered by the court in this case and sought to inject factual matters that were not in the record considered by this Court in this appeal.

As stated in the Opinion of September 13, 1979 the issues before this Court were narrow. Even more narrowly drawn is the issue presented by Defendants' motion of September 25, 1979. The issue is stated to be: Even though the mandate of this Court has not yet issued, may the court receiver conduct itself in such a manner as to complete-

ly frustrate the jurisdiction and power of the court and reap the benefit from its wronfgul conduct which was described in the September 13, 1979 opinion?

It is to be noted at the outset that this Court does not have the power or the jurisdiction in any degree to limit or control in any way the jurisdiction of the Federal District Court and does not seek to do so. This Court does, however, have jurisdiction over the parties and over the subject matter of this cause of action as described in the September 13, 1979 opinion. Of greater force than the matter of jurisdiction is the rule that the court controls its own receiver, an officer of and an arm of the court.

In its presentation before the Court both in its brief and at the hearing on the instant motion the receiver has at-

tempted to convince the court that it is acting in a dual capacity, that it is before the court in dual position. That argument was rejected in the September 13, 1979 opinion of this Court and must be rejected now.

As was stated in the September 13, 1979 opinion the receiver was wrong when it acquired the 48 mortgages from Illini and it was wrong when it filed suit to foreclose these mortgages, the reasons for this were discussed in the opinion and need not be further considered here. In the same manner the receiver is wrong, and greviously so, in seeking to gain an advantage and profit from its breach of faith and duty to the court by taking means to divest itself of the forty-eight mortgages in question before the action of this Court becomes final by issuance of its mandate.

If the 48 mortgages are foreclosed they would then be merged into a judgment of the Federal Court and cease to exist and therefore there would be nothing to reassign in compliance with the prospective mandate of this Court. The foreclosure action brought by the receiver would completely frustrate the jurisdiction and prospective order of the court which it serves and which designated it as receiver.

This Court would be justified in accelerating its mandate under Supreme Court Rule 368 but it declines to do so for it would foreclose the parties of an opportunity to file petitions for rehearing and furnish this Court the further opportunity to consider the case in the light of these petitions for rehearing.

As in the case of our September 13,

1979 decision, we decline to address the right to possession of the premises involved in this case. Our sole consideration here is the wrong perpetrated upon the court by its receiver by breach of faith and duty and the prevention of the gaining of an advantage or profit by the receiver by reason of such wrongful conduct. In like manner it would but compound the wrong if the receiver were to transfer or assign its interest in the mortgages to another and permit them to gain an advantage or benefit they would otherwise be unable to acquire. Specificially, the receiver should not be permitted to transfer the wrongfully acquired mortgages to Illini who would then be plaintiffs in a foreclosure action in federal court in an advanced stage of the foreclosure proceedings. Transfer by the receiver would permit by indirection

that which the receiver could not achieve directly, that is, the removal from the jurisdiction of the court the 48 wrongfully acquired mortgages.

The Court deems it prudent to order a stay against its receiver, FSLIC, and the plaintiffs Illini Federal Savings and Loan Association and PSL Realty Co., to prevent them from dealing with the 48 mortgages in any manner whatsoever otherwise than as directed by its opinion of September 13, 1979. Authority for issuance of a stay order is found in Supreme Court Rule 305(b) and 366(c), and in the inherent common law power of the court.

IT IS THEREFORE ORDERED that the receiver of the court, FSLIC, and the plaintiffs Illini Federal Savings and Loan Association and PSL Realty Co., stay any further action of any nature

whatsoever in regard to the 48 mortgages, including, but not limited to, the prosecution of any action to foreclosure upon the 48 mortgages in Federal District Court for the Southern District of Illinois, or any other court, and that they further stay any and all other attempts to transfer or assign such mortgages in any matter to any person or entity whatsoever pending further order of this Court or the issuance of its mandate.

IT IS FURTHER ORDERED that any actual or attempted transfer of title by the receiver, FSLIC, or the plaintiffs herein, brought about in any manner including sale or transfer whether pursuant to foreclosure of mortgages or by direct assignment, or otherwise, shall be void and ineffective to transfer title to such mortgages or the property they incumber. The defendants or their agents are di-

rected to cause a copy of this order for stay, together with a description of the land encumbered by the 48 mortgages in question, to be recorded in all counties of Illinois in which any real estate herein involved is located, such order for stay to serve as notice to all purchasers or prospective purchasers in compliance with Ill.Rev.Stat., ch 110, par. 395 and Ill.Rev.Stat., ch. 30, par. 121. ENTERED: "September 26, 1979 and hand delivered to counsel of all parties."

At the September 28, 1979 rehearing the defendants filed with this court a petition for an order of court finding the receiver and the plaintiffs in contempt of court and for assessment of a fine of $10,000,000 as punishment therefor. We decline to consider this petition at this time. If appropriate it

may be refiled in the circuit court upon issuance of the mandate of this court.

Also at the September 28, 1979 hearing the receiver and the plaintiffs argued that the Order for Stay went beyond the consideration of the September 13, 1979 opinion when it stated that any attempted transfer of title to the properties in question would be void. If such an order were applicable to an ordinary party to a lawsuit, the argument might well be valid. However, we deem it otherwise when it is considered that the order is applicable to the court receiver and any who may take therefrom.

That portion of the incorporated Order for Stay relating to the acceleration of the mandate is superseded by this supplemental opinion. Also, that portion of the incorporated Order for

Stay indicating that the stay would terminate upon issuance of the mandate is superseded. The provisions of the Order for Stay are made an operative part of the opinion of the court.

Mandate ordered to issue instanter.

NO. 80-1625

MAY 27 1981

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Petitioners,

vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Respondent,

vs.

PSL REALTY CO., a corporation, et al,

Respondents,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

BRIEF OF PSL REALTY CO. IN OPPOSITION

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PSL REALTY CO.

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by entering an injunction preventing the parties before it and the Judges of the Illinois State Court System from further interfering with the District Court's exclusive possession of and jurisdiction over certain real property.

2. Whether principles of comity and federalism should be extended to render the injunction at issue erroneous.

OPINIONS BELOW

The Opinion of the court of appeals (Pet. App. A) is reported at 603 F.2d 515 (1980). The Opinion of the district court (Pet. App. C) is reported at 482 F.Supp. 77 (1979).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. A

petition for rehearing and rehearing en banc was denied on December 23, 1980 (Pet. App. B). The petition for writ of certiorari was filed by mailing on March 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT AND ARGUMENT

Respondent PSL Realty Co. ("PSL"), a wholly-owned subsidiary of Illini Federal Savings and Loan Association, is the fee-owner of record of all the real estate involved in the foreclosure action presently pending in the United States District Court for the Southern District of Illinois.

PSL, to avoid burdening this Court with additional argument, hereby adopts and incorporates by reference herein as its brief the Brief For The Federal Savings And Loan Insurance Corporation In Opposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 26, 1981

NO. 80-1625

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

Respondent, vs.

PSL REALTY CO., a corporation, et al,

Respondents,

THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

AFFIDAVIT

W. Stanley Walch, a member of the Bar of this Court, being first duly sworn, deposes and states that he has knowledge that forty (40) copies of Brief of PSL Realty Co. in Opposition To Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the above cause were enclosed in an envelope addressed to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D.C. 20544, with prepaid first class postage affixed thereto, and deposited in the United States mail at St. Louis, Missouri, on May 26th, 1981.

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Attorneys for Respondent
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SUBSCRIBED and SWORN to before me this 26th day of May, 1981.

Heidi A. Klees

HEIDI A. KLEES
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES APRIL 22, 1985
ST. LOUIS COUNTY

NO. 80-1625

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, a Limited Partnership; JAMES C. GREEN; CAPITOL INDEMNITY CORPORATION, a corporation; and HOWARD STEELE CONSTRUCTION CO.,

Petitioners, vs.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an agency of the United States of America,

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THE HON. CHARLES E. JONES; THE HON. JOHN M. KARNES; THE HON. GEORGE W. KASSERMAN, JR.; and all other JUSTICES OF THE ILLINOIS APPELLATE COURT FOR THE FIFTH DISTRICT; THE HON. VICTOR J. MOSELE, and all JUDGES OF THE THIRD JUDICIAL CIRCUIT OF ILLINOIS.

Respondents.

CERTIFICATE OF SERVICE

W. Stanley Walch, a member of the Bar of this Court, hereby certifies that three copies of Brief For PSL Realty Co. In Opposition To Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Judicial Circuit was served on the parties named below by depositing the same in the United States

Mail at St. Louis, Missouri on May 26, 1981, in the envelopes plainly addressed as shown below, with prepaid first class postage affixed thereto:

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The above constitutes service on counsel for all parties known to be interested in

this cause.

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No. 80-1625

MAY 29 1

In the Supreme Court of the United States

OCTOBER TERM, 1980

GRANITE INVESTMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by enjoining the parties before it and the judges of the Illinois state court system from further interference with the district court's possession of and jurisdiction over certain real property.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Baker v. *Administrator of Backus*, 32 Ill. 79 7

Blanchard Bro. & Lane. v. *Gay Co.*, 289 Ill. 413, 124 N.E. 616 7

Donovan v. *Dallas*, 377 U.S. 408 9

Doyne v. *Saettele*, 112 F. 2d 155 7

Firebaugh v. *McGovern*, 404 Ill. 143, 88 N.E.2d 473 7

Juidice v. *Vail*, 430 U.S. 327 8

Lockport v. *Citizens for Community Action*, 430 U.S. 259 8

People v. *Weigley*, 155 Ill. 491, 40 N.E. 300 7

Steenrod v. *Gross Co.*, 334 Ill. 362, 166 N.E. 82 7

Village of Belle Terre v. *Boraas*, 416 U.S. 1 8

Younger v. *Harris*, 401 U.S. 37 8

PRECEDING PAGE WAS BLANK

Page

Statutes:

12 U.S.C. 1725(c)(4) 9
12 U.S.C. 1730(k)(1) 9
28 U.S.C. 1345 9
28 U.S.C. 2283 ..... 6, 8

Miscellaneous:

14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1976) 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1625

GRANITE INVESTMENT COMPANY, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 630 F. 2d 515. The opinion of the district court (Pet. App. C) is reported at 482 F. Supp. 77.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. A petition for rehearing was denied on December 23, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on March 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971, the Federal Savings and Loan Insurance Corporation (FSLIC) determined that Piasa Federal Savings and Loan Association, an Illinois Savings and Loan Association, was on the verge of insolvency. FSLIC arranged a

merger of Piasa into Illini Federal Savings and Loan Association in an attempt to remedy the insolvency. To induce Illini to enter into the merger, FSLIC also executed a contribution agreement that required it either to subsidize Illini for certain losses incurred by Illini in connection with non-earning Piasa assets acquired in the merger or, at the option of FSLIC, to purchase such assets from Illini at any time for book value (Pet. App. A-3).[1]

Petitioners claim to have ownership rights in several apartment complexes encumbered by mortgages ("the Green Properties") that were part of the non-earning assets acquired by Illini as a result of the merger.[2] At the time of the merger, the loans secured by the mortgages amounted to approximately $14 million and were seriously delinquent (Pet. App. A-3).

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[1]Because the appendix to the petition is not numbered consecutively, we shall refer to the individual appendices by their letter designations and page numbers.

[2]In the early 1960's petitioners Green and Granite and various corporations and nominees controlled by them executed several first lien mortgages in favor of Piasa in order to finance the construction of various apartment complexes located in Clinton, St. Clair and Sangamon Counties, Illinois. When financial difficulties were encountered in the completion of the complexes, the parties entered into a Base Agreement, dated August 1, 1970, in order to afford additional construction funds by restructuring the debt. Under the agreement, title to the Green properties was conveyed to respondent PSL Realty Company, a newly formed corporation wholly owned by Piasa. PSL then entered into contracts for deed to the same properties with petitioner Granite Investment Company, a limited partnership of which petitioner Green was the principal. Petitioner Granite was to manage the properties until the conditions imposed by the contracts for deed were fulfilled, at which time PSL would reconvey the properties to Granite. During that time PSL had an absolute right to all income generated by the properties. Piasa continued to hold the first lien mortgages as mortgagee. When the Granite management scheme proved unsuccessful, the merger described in the text was arranged (Pet. App. A-2 to A-3).

Illini and its subsidiary, respondent PSL Realty Co., encountered considerable difficulty in administering the delinquent loans. By March 1972 the economic situation had deteriorated to such an extent that Illini and PSL filed suit against petitioners in the Circuit Court of Madison County, Illinois, seeking an injunction requiring petitioners to turn over their books and records for inspection, to refrain from collecting further rents on the Green properties and to cease interfering with PSL's collection of the rents. A temporary restraining order to that effect was issued, and on April 28, 1972, the trial court denied petitioners' motion to dissolve the injunction. Without objection by any of the parties, FSLIC was appointed receiver of the properties (Pet. App. A-3 to A-4).

Petitioners took an interlocutory appeal from the issuance of the injunction and the appointment of the receiver. On July 23, 1976, the Illinois Appellate Court for the Fifth District dissolved the temporary injunction and the receivership on the ground that these ancillary remedies were inappropriate in the absence of pleadings seeking some form of ultimate relief. The case was remanded solely for an accounting of the income and expenses of the receivership, for a determination of the distribution of the net income, and for an award of a fee to the receiver (Pet. App. A-4, D-1 to D-18).

On August 13, 1976, PSL and Illini filed a petition for rehearing with the Appellate Court, and on August 18, 1976, FSLIC exercised its right under the contribution agreement to purchase the mortgages encumbering the receivership properties. On August 26, 1976, FSLIC filed this action in the United States District Court for the Southern District of Illinois to foreclose on the mortgages. On August 31, 1976, petitioners also applied to the Appellate Court for rehearing, specifically advising the court that

FSLIC had purchased the mortgages and was prosecuting a foreclosure action in federal court (Pet. App. A-4 to A-5).

In the interim, FSLIC had advised the district court of the receivership, its role as receiver, and the Illinois Appellate Court's disposition of the receivership. Petitioners challenged the propriety of FSLIC's purchase of the mortgages and commencement of the foreclosure action. On September 2, 1976, the district court entered an order authorizing FSLIC to remain in possession of the properties as mortgagee "operative upon the effective date of the mandate from the Illinois Appellate Court for the Fifth District dissolving FSLIC's status as receiver of the subject properties" (Pet. App. A-5). On September 13, 1976, the Illinois Appellate Court denied the petitions for rehearing without mentioning FSLIC's purchase of the mortgages or commencement of a foreclosure action. The mandate issued on October 13, 1976 (Pet. App. A-5, D-18 to D-20).

More than three years of intensive but intermittent proceedings ensued in the district court in connection with the foreclosure action. In addition, wind-up proceedings for the receivership took place in the Circuit Court of Madison County, pursuant to the mandate of the Illinois Appellate Court. On April 28, 1977, the circuit court overruled petitioners' challenges to FSLIC's conduct as receiver and entered an order approving FSLIC's final report and discharging FSLIC as receiver retroactively to September 30, 1976. Petitioners appealed to the Illinois Appellate Court from this order as well (Pet. App. A-5).

FSLIC concluded its case in the foreclosure action, and the district court denied petitioner Granite's motion for a directed verdict in that case, on November 16, 1978. Petitioners commenced presentation of their case, but during the spring of 1979 the district court recessed that trial until September 24, 1979. On September 13, 1979, however, more than three years after it first learned that FSLIC had

commenced the foreclosure action, the Illinois Appellate Court held that FSLIC had breached its fiduciary duty as receiver by acquiring the mortgages and commencing the foreclosure action. It ordered FSLIC to reconvey the mortgages to Illini, apparently intending by that order to terminate the foreclosure action (Pet. App. A-5 to A-6, E-1 to E-67).

On September 26, 1979, the district court entered an order confirming its jurisdiction over the parties and its possession of the properties, and noted that it was compelled to do whatever was necessary to protect that jurisdiction (Pet. App. A-6). On the same day, Justice Charles E. Jones of the Illinois Appellate Court entered an Order for Stay purporting to enjoin FSLIC and PSL from proceeding further with the foreclosure action in the district court. The order also declared that any attempt by FSLIC to transfer title to the properties involved in the foreclosure case would be void (*id.* at A-6, E-72 to E-81). FSLIC sought reconsideration of the order by three justices of the Illinois Appellate Court. On October 2 the Appellate Court entered a supplemental opinion in which it refused to withdraw the Order for Stay (*id.* at E-68 to E-83).

Also on October 2, 1979, the district court entered a preliminary injunction to prevent any further interference by, *inter alia*, the justices of the Illinois Appellate Court with the federal court's exclusive jurisdiction and supervision over the Green properties (Pet. App. C-1 to C-26). Following a hearing the district court entered an order on October 11, 1979, making the injunction permanent (*id.* at A-7 to A-8).

Petitioners and the Attorney General for the State of Illinois, on behalf of the justices of the Illinois Appellate Court, took an interlocutory appeal to the court of appeals. That court affirmed, concluding that the district court had

maintained exclusive possession and control over the properties and that it had not abused its discretion by entering an injunction to protect that exclusive possession (Pet. App. A-8 to A-13).

Meanwhile, FSLIC appealed to the Illinois Supreme Court from the Illinois Appellate Court's holding that FSLIC had breached its fiduciary duty and from the Appellate Court's orders purporting to enjoin the foreclosure action and to prevent transfer of title to any of the subject properties. Upon FSLIC's motion, the Illinois Supreme Court withdrew the mandate of the Illinois Appellate Court and stayed the force and effect of the lower court's orders pending disposition of FSLIC's appeal.[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, in view of the fact-bound nature of this case, the state law issues presented, concerning receivership and real property, are without general significance or application. Further review accordingly is unwarranted.

1. Once a court of competent jurisdiction has obtained exclusive possession or control of property, that possession may not be disturbed by another court. 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3631 (1976). Applying this well established principle to the unique facts of the present case, the court of appeals upheld the district court's issuance of an injunction under 28 U.S.C. 2283 to protect its jurisdiction over the Green properties.[4] That

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[3]That appeal was submitted to the Illinois Supreme Court for decision on March 18, 1981.

[4]28 U.S.C. 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by

jurisdiction, the court of appeals found (Pet. App. A-11), had commenced on October 13, 1976, the date of the issuance of the mandate from the Illinois Appellate Court dissolving the temporary injunction. The court of appeals relied on *Doyne* v. *Saettele*, 112 F. 2d 155, 161 (8th Cir. 1940), the only federal case in point, to hold that the preexisting state court receivership, although not fully wound up at the time, constituted no bar to the district court's assumption of exclusive jurisdiction over the properties or to its taking whatever measures were necessary to protect that jurisdiction.

Petitioners focus (Pet. 14-38) their challenge to the decision below particularly upon the court of appeals' conclusion that because the state court that appointed the receiver never properly had possession of the properties, the receivership was void *ab initio*. But there is no need for this Court to review this issue of state law. In any event, it is well settled Illinois law that where the ultimate relief requested in a complaint is beyond the jurisdiction of the court, the granting of ancillary relief, such as the appointment of a receiver, is also beyond its jurisdiction and, accordingly, void *ab initio*. See *Firebaugh* v. *McGovern*, 404 Ill. 143, 150-151, 88 N.E.2d 473, 476-477 (1949); *Steenrod* v. *Gross Co.*, 334 Ill. 362, 369, 166 N.E. 82, 84 (1929); *Blanchard Bro. & Lane* v. *Gay Co.*, 289 Ill. 413, 420-421, 124 N.E. 616, 619 (1919); *People* v. *Weigley*, 155 Ill. 491, 502, 40 N.E. 300, 303 (1895); *Baker* v. *Administrator of Backus*, 32 Ill. 79, 95-96 (1863). *A fortiori*, here, where *no ultimate relief was requested*, it was beyond the circuit court's jurisdiction to appoint a receiver as ancillary relief; that appointment, accordingly, was void *ab initio*. See *Baker* v. *Administrator of Backus, supra*, 32 Ill. at 95 ("a suit must be pending * * * before a receiver will be appointed").

Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Finally, the court of appeals' conclusion that the state court receivership was void *ab initio* does not fail to accord full faith and credit to any decision of the Illinois Appellate Court, since that court never specifically ruled on the question whether the receivership was void *ab initio*.[5]

2. Petitioners also contend (Pet. 39-53) that the district court's issuance of an injunction under 28 U.S.C. 2283 violated the principles of comity and equity enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Juidice* v. *Vail*, 430 U.S. 327 (1977), because it would preclude a state court contempt proceeding that might be instituted against FSLIC in the future.

Petitioners' suggestion, however, would require an extension of the *Younger* abstention doctrine far beyond its present bounds. *Younger* forbids federal courts from enjoining *pending* state court proceedings, except in carefully limited circumstances. Conversely, the abstention principles enunciated in *Younger* and *Juidice* do not apply to an injunction issued by a federal district court *prior to* the commencement of state court proceedings. See *Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977) ("principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court"); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 3 n.1 (1974).

The injunction was entered in the present case to protect the longstanding jurisdiction of the district court, not to

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[5]Moreover, the district court assumed jurisdiction over the Green properties in 1976, based upon the 1976 opinion of the Illinois Appellate Court, not upon what the Appellate Court was to say three years later, at a time when a protracted trial in the district court was nearing conclusion. Clearly there was no lack of full faith and credit in the district court's assumption of jurisdiction over the Green properties in 1976 after the Appellate Court had dissolved the receivership.

halt ongoing state criminal or quasi-criminal proceedings in order to permit federal review of their constitutionality. Petitioners twice have attempted to induce the Illinois courts to initiate contempt proceedings against FSLIC (Pet. 43-45). But no contempt proceeding is currently pending against FSLIC, and no such proceeding ever has been instituted by any state court involved in this litigation. Petitioners' bare hope for a contempt proceeding in the future in connection with this lawsuit provides no basis for federal court abstention on *Younger* grounds.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

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[6] *Younger* abstention also is inappropriate here because it would permit a state court to punish a litigant for exercising its statutory right of access to the federal courts. Petitioners' attempts to induce the Illinois state courts to initiate contempt proceedings against FSLIC are based on FSLIC's filing and continued prosecution of the foreclosure action in the district court. But FSLIC has a congressionally-granted right to bring such an action in federal court. 12 U.S.C. 1725(c)(4), 1730(k)(1); 28 U.S.C. 1345. This right cannot be taken away by the threat of contempt. See *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964).